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William K. Lietzau

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# REDISCOVERING THE ESTABLISHMENT CLAUSE: FEDERALISM AND THE ROLLBACK OF INCORPORATION

*William K. Lietzau**

## INTRODUCTION

In 1791 the people of the United States ratified the first amendment to our Constitution and thus enshrined the two principles deemed necessary for preserving religious liberty. First, the free exercise clause acknowledged a fundamental substantive right: each citizen was guaranteed the freedom to believe and practice in accordance with their own religious convictions.[1] Second, the establishment clause embodied a structural safeguard to maximize protection of this substantive right: a framework of federalism was instituted to preserve religious liberty by fostering local decisionmaking authority on church/state issues.[2] The national government was thus specifically enjoined from dictating any policy in the area of religious establishment.[3] These principles facilitated the gradual development of constitutional law for 150 years as the United States learned to accommodate a multiplicity of new religious viewpoints. This development, however, ceased in 1947 when the Supreme Court began actively adjudicating in the area of religion while ignoring the first amendment's structural safeguards.[4]

The first amendment expressly prohibits the *"United States Congress"* from making any law "respecting an establishment of religion." Yet, in its treatment of this clause, the Supreme Court has focused almost exclusively

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* Judge Advocate, United States Marine Corps; B.S., 1983, United States Naval Academy; J.D., 1989, Yale Law School. Many thanks to Akhil Amar, John Edwards, Robert Pushaw, Scott Ward and to my wife Diane, for their helpful comments and stimulating conversation.

1. "Congress shall make no law . . . prohibiting the free exercise [of religion]; . . . ." U.S. CONST. amend. I.

2. "Congress shall make no law respecting an establishment of religion, . . . ." U.S. CONST. amend. I.

3. It is this second structural or procedural aspect which is too often overlooked and will be analyzed in this Article. *See* M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 15 (1978) (arguing that most commentators fail to see dual purpose of first amendment and underestimate importance of nation-state issue for members of first Congress).

4. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (establishment clause incorporated by fourteenth amendment). The Court had previously begun hearing state-based free exercise cases with Cantwell v. Connecticut, 310 U.S. 296 (1940). In *Cantwell,* the Court held that the free exercise clause was made applicable against the states by the fourteenth amendment. *Id.* at 303-04.

on the actions of state governments.[5] While state-run public schools are prohibited from posting the Ten Commandments[6] or having prayer in the classroom,[7] Congress has directed the printing of "In God We Trust" on all United States currency,[8] and United States military academies have school-wide prayer before each meal.[9] Similarly, states are prohibited from using public funds to supplement parochial school teacher salaries,[10] yet Congress regularly uses federal funds for its own chaplains and an extensive military chaplaincy.[11] These examples represent far more than mere inconsistencies; they reflect a complete inversion of the framework set up by our founders.[12]

The past forty years have been attended by much debate regarding establishment clause interpretation which has resulted in both incoherence in theory and inconsistency in application.[13] This confusion has been criticized by numerous commentators, but nearly all have focused on a more accurate

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5. Prior to incorporation, the Supreme Court had not even squarely defined "establishment of religion" and had heard only three cases implicating establishment clause concerns. Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930) (Louisiana's purchase of nonsectarian textbooks for students in parochial schools upheld); Quick Bear v. Leupp, 210 U.S. 50 (1908) (payments to a Roman Catholic school on an Indian reservation upheld); Bradfield v. Roberts, 175 U.S. 291 (1899) (congressional payments to benefit poor at a religious District of Columbia hospital found constitutional). In no pre-*Everson* case was a government action ever found to violate the establishment clause. J. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 33 (1985).

The occurrence of establishment clause litigation has multiplied significantly since *Everson*. For statistics regarding the incidence of church-state cases, see F. SORAUF, THE WALL OF SEPARATION 339 (1973).

6. Abington School Dist. v. Schempp, 374 U.S. 203, 223-25 (1963).

7. Wallace v. Jaffree, 472 U.S. 38, 48-61 (1985); Engel v. Vitale, 370 U.S. 421, 453 (1962).

8. 31 U.S.C. § 5112(d)(1) (1982). Congress, since 1865, has regularly enacted legislation mandating that "In God We Trust" be impressed on our coins. *E.g.*, Act of Mar. 3, 1865, ch. C, § 5, 13 Stat. 517; Act of Feb. 12, 1873, ch. CXXXI, § 18, 17 Stat. 427; Act of May 18, 1906, ch. 173, 35 Stat. 164; Act of July 11, 1955, ch. 303, 69 Stat. 290.

9. Until recently, all students at military academies were also required to attend chapel services. *See Engel*, 370 U.S. at 438 n.2 (Douglas, J., concurring).

10. Lemon v. Kurtzman, 403 U.S. 602, 611-25 (1971). *See also* Wolman v. Walter, 433 U.S. 229, 248-55 (1977) (no books, salaries or transportation costs); Meek v. Pittenger, 421 U.S. 349, 362-66 (1975) (no providing books or other supplies).

11. *See* Katcoff v. Marsh, 755 F.2d 223, 229 (2d Cir. 1985). One of the first acts of Congress was to establish the offices of the House and Senate chaplains. 1 J. OF SENATE 16 (Apr. 7, 1789); 1 J. OF HOUSE REP. 26 (Apr. 9, 1789). As late as 1954, Congress added "one Nation under God . . ." to our pledge of allegiance. *Engel*, 370 U.S. at 449 (Stewart, J., dissenting); 36 U.S.C. § 172 (1954). In 1952, Congress called upon the president to proclaim a National Day of Prayer. 36 U.S.C. § 185 (1952).

12. Apparent inconsistencies have been individually justified by their differing contexts. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 60-61 & n.51 (1985) (secondary school prayer distinguished from congressional prayer due to the malleable nature of young minds); *Katcoff*, 755 F.2d at 223, 232-35 (military chaplaincy distinguished due to exigencies of military life). The adequacy of such distinguishing rationales is severely limited by the frequency of their use and the consistent bias of outcome.

13. *See Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting) ("[I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified"); L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 162 (1986).

interpretation of "establishment of religion" instead of the propriety of the clause's application against state governments via "incorporation" into the fourteenth amendment.[14] The several critics of establishment clause incorporation either fail to distinguish the clause in the context of selective incorporation, thus making arguments which undercut Bill of Rights incorporation *in toto*,[15] or they treat the issue as moot and ignore underlying federalism concerns which promote religious liberty and militate in favor of a rollback.[16]

This Article argues that the establishment clause, both as originally conceived and as understood during the Reconstruction, was meant to be applied *only* against the national government. Incorporation, therefore, is neither mandated *nor* permitted.[17] Examined in light of the current policy debate over establishment clause application, the Court's error regarding incorporation proves to be much more than a mere misreading of history; it is an assault on the very heart of the first amendment's religious liberty protections. A return to the proper interpretation of the first amendment would vindicate the framers' intent and positively influence the policy goal of preserving religious freedom.

This Article proffers a potentially effective balance between church/state relations on a national level and church/state relations on a state level,[18] which comports with relevant legal history and provides a procedural frame-

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14. *See, e.g.*, R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE (1951); T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); J. REICHLEY, *supra* note 5, at 5; Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 9 (1978).

15. *See, e.g.*, Jaffree v. Board. of School Comm'rs, 554 F. Supp. 1104, 1112-18 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

16. *See, e.g.*, E. CORWIN, *supra* note 14, at 116; D. DREISBACH, REAL THREAT AND MERE SHADOW (1987); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317-26 (1986). One work deserving of special recognition for distinguishing the uniquely problematic nature of incorporating the establishment clause is Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371. Much of Professor Snee's article is still relevant today. Missing, however, is hindsight analysis explaining why incorporation, which Snee at the time thought could still be avoided, is a policy detrimental to religious liberty and not just a historical mistake.

17. *Cf.* E. CORWIN, *supra* note 14, at 116 ("So far as the Fourteenth Amendment is concerned, States are entirely free to establish religion, provided they do not deprive anybody of religious liberty"); *but cf.* M. HOWE, *supra* note 14, at 138-46 (finding establishment clause to be constitutionally "permitted" if carefully applied, though not "mandated").

18. Most commentators instead focus on an appropriate balance between free exercise and nonestablishment. This Article does not intend to discredit any of the valid criticisms regarding Supreme Court misunderstandings about the intended extent of disestablishment or the inherent tension between free exercise and nonestablishment.

work sufficiently subtle to deal with the complicated policy considerations involved. Section I of this Article provides historical background which demonstrates that today's inverted application of nonestablishment principles is antithetical to the intentions of the framers. Next, section II examines the Court's legally questionable treatment of the establishment clause and briefly discusses the prospects for change. Finally, section III illustrates how the clause's current application undermines religious freedom and promotes a bias in favor of atheistic or "nonreligious" philosophical viewpoints. Calling for a limited rollback in establishment clause incorporation doctrine, this final section evaluates the policy implications of a reconstruction of the federalist framework and details its positive consequences with respect to religious liberty.

## I. HISTORICAL FOUNDATIONS

> [A] great many Americans . . . tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history. Happily that is not the case. Each of us is entirely free to find his history in other places than the pages of the *United States Reports.*
>
> —Mark DeWolfe Howe, 1965[19]

Critics of establishment clause jurisprudence frequently look to first amendment history to support a particular view of proper church/state relations. Similarly, commentators on the fourteenth amendment cite applicable history to either favor or condemn incorporation of the first eight amendments into the fourteenth amendment's due process guarantee. Both pursuits are useful as academic exercises, but are nonetheless unlikely to generate significant movements in constitutional law.[20] Hence, this Article does not dwell on these legalistic arguments regarding incorporation or specific historical views on church/state policies. Instead, it attempts to analyze the policy reasons behind the federalist scheme originally developed for the area of church and state relations.

### *A. The First Amendment*

The first amendment can only be understood in light of the religious and political concerns guiding its framers. Realizing that there is no single accepted view of constitutional interpretation, this Article presumes that the framers' intent is, at the very least, an important factor to be considered when applying constitutional principles.[21] While the efficacy of historical analysis is severely limited for resolving inquiries about the "correct" un-

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19. M. HOWE, *supra* note 14, at 5.

20. *See* Wallace v. Jaffree, 472 U.S. 38, 48 (1985).

21. "The intention of the lawmaker is the law." Hawaii v. Mankichi, 190 U.S. 197, 212 (1903). The importance and relevance of "original intention" has been attacked by numerous

derstanding of religious establishment, this is not the case with respect to the question of establishment clause incorporation. Viewed with the foreknowledge of selective incorporation, applicable history definitively exempts the establishment clause from the category of "fundamental rights" appropriately constraining the states.

### *1. Colonial Antecedents*

> Our constitution was made only for a moral and a religious people. It is wholly inadequate for the government of any other.
>
> —John Adams[22]

Considering the present importance of the Bill of Rights, it is surprising to note that the First Congress spent relatively little time discussing its provisions.[23] What were considered to be more pressing needs account for some of this legislative apathy, but much of the inattention follows from the fact that there was little dispute as to what rights were deemed fundamental.[24] In 1789, the state charters, laws, and declarations of rights had the primary responsibility for protecting individual liberty.[25] It is therefore reasonable to look to these more painstakingly drafted precursors to the Bill of Rights in order to unveil its meaning.[26]

Since its inception, this nation's life has been animated by religious movements and accompanying questions about appropriate church/state relations. Historians have described religion's role in colonial America as

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scholars. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977) (favoring original intent restrictions on the judiciary); L. LEVY, JUDGMENTS: ESSAYS IN AMERICAN CONSTITUTIONAL HISTORY 17 (1972) (claiming that there was no intent to "freeze" the Constitution's original meaning). Nevertheless, few scholars would claim a discernable legislative intent to be devoid of import. James Madison once opined: "if the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government]." 9 J. MADISON, THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1900-1910), *noted in* R. BERGER, *supra*, at 3, 364.

22. *See* R. NEUHAUS, THE NAKED PUBLIC SQUARE 95 (1984).

23. Professor Levy describes the debates as "brief, listless, and unclear." L. LEVY, *supra* note 13, at 108. Describing individual speeches as "sometimes irrelevant, usually apathetic and unclear," Levy calls it "doubtful" whether most members of the House understood or even cared about the outcome of the debates. *Id.* at 79. *See also* M. MALBIN, *supra* note 3, at 5-6 (discussing length of debates). Madison even had difficulty getting the House to agree to discuss the amendments. L. LEVY, *supra* note 13, at 108.

24. It is also reasonable to infer that the substance of the rights themselves was fairly well agreed upon. *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (1966) (Col. Mason suggesting during Constitutional Convention that a Bill of Rights could be prepared "in a few hours" with the aid of state declarations). The debate during framing was whether or not to have a Bill of Rights, not what those rights should be.

25. *See* B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 53-103 (1977) (general discussion of revolutionary era protections of fundamental rights).

26. The Anglo-American practice of drafting lists of rights had its genesis in 1215 with the Magna Charta. Religious liberty is conspicuously absent from this original bill and its English descendants, but is the most common right found in American bills. *Id.*

"the single most influential cultural force."[27] Many of the first settlers came to this country seeking to escape religious persecution, but they also came with the intent of establishing the "city on a hill," an exemplary community committed to Christian principles.[28] As a result, they did not abandon state established religion, but adjusted the establishments to suit their various religious needs.[29]

Such strongly religious peoples were rarely in complete doctrinal agreement, and minority groups were sometimes the subject of discrimination.[30] The colonists thus learned that inviolable safeguards were needed to protect religious rights. Revolutionary documents and colonial charters reveal that many of the precursors to the Bill of Rights contained provisions providing for the free exercise of religion. In fact, this was the only right protected in every state constitution.[31] By contrast, no state constitution mandated church/

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27. *See* J. REICHLEY, *supra* note 5, at 53. *See also* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 160 (1975) (statistics on colonial America's religious involvement).

28. Many Puritans, for example, believed that God established the state for the purpose of restraining sin. *See* T. CURRY, *supra* note 14, at 3; J. DRAPER & F. WATSON, IF THE FOUNDATIONS BE DESTROYED 26-40 (1984); J. EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 28 (1987); P. MILLER, ERRAND INTO THE WILDERNESS 1-15 (1965).

This view of America as a godly society to serve as a model for the old corrupted world was not quickly lost during colonial growth and is by no means extinct today. In his celebrated speech just prior to the signing of the Declaration of Independence, Patrick Henry said:

> Father! The old world is . . . drenched with the blood of millions who have been executed, in slow and grinding oppression. Father, look! With one glance of Thine eternal eye, look over Europe, Asia, Africa, and behold everywhere a terrible sight—man trodden down beneath the oppressor's feet, nations lost in blood, murder and superstition walking hand in hand over the graves of their victims, and not a single voice to whisper hope to man.
>
> . . . But hark! The voice of Jehovah speaks out from the awful cloud: Let there be light again. Let there be a new world. Tell My people, the poor, downtrodden millions, to go out from the old world. Tell them to go out from the old world to build up My altar in the new.

P. Henry, Speech given in Independence Hall, Philadelphia, prior to the signing of the Declaration of Independence (July 4, 1776), *reprinted in* AMERICAN STATE ARTICLES ON FREEDOM OF RELIGION 70-72 (W. Blakely, ed. 1943).

29. For a history of church establishments in the colonies see J. REICHLEY, *supra* note 5, at 53-96; J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 24 (1873). Save perhaps Rhode Island, Story claimed that every state from the founding on:

> [D]id openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines . . . . Any attempt . . . to hold all [religions] in utter indifference would have created universal disapprobation, if not universal indignation.

*Id.* at 604. *See also* S. AHLSTROM, *supra* note 27, at 160 (1975) (statistics on colonial America's religious involvement).

30. *See* L. LEVY, *supra* note 13, at 1-24.

31. By the end of the Revolutionary War, each of the thirteen state constitutions contained provisions protecting religious freedom. The right was usually fashioned "freedom of conscience," and involved espousal of a policy of toleration for all personal beliefs. Forced doctrinal statements or mandatory oaths were especially inimical. For a listing of declarations and the frequency of the occurrence of various rights see B. SCHWARTZ, *supra* note 25, at 87.

state separation as we know it today.[32] At the beginning of the revolution, eight colonies had established churches,[33] and at the 1789 meeting of the First Congress, religious establishments remained throughout most of New England.[34]

Several rights enumerated in the first ten amendments were widely recognized prior to the framing of the Bill of Rights. Freedom of religion was clearly one of them.[35] This did not mean, however, that nonestablishment was necessary as a corollary principle. Indeed, many would have argued that religious convictions demanded expression through popular government.[36] Each of the thirteen colonies developed its own scheme for securing the one liberty that was universally accepted, namely freedom of conscience.[37] In protecting that freedom they employed varying degrees of state sponsorship of religion.[38] Free exercise was not seen to include freedom from the influence of an established church or religion, but freedom to accept or reject the "established" doctrines. Thus, establishment and free exercise coexisted with minimal conflict.[39] "Separation of church and state" was a foreign and

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32. *See* M. KONVITZ, BILL OF RIGHTS READER 60 (1968). Only New Jersey's document protecting the freedom of religion contained a rudimentary clause prohibiting the establishment of a particular sect. B. SCHWARTZ, *supra* note 25, at 87.

33. Virginia, Maryland, North Carolina, South Carolina and Georgia all had established the Church of England. Massachusetts, Connecticut, and New Hampshire had established Congregationalism. While New York did not establish a specific denomination, it effectively mandated Protestantism. *See* M. KONVITZ, *supra* note 32, at 104; L. LEVY, *supra* note 13, at 5.

34. For a history of the evolution of state religious establishments, see L. LEVY, *supra* note 13, at 5.

35. Other examples of protected rights and the frequency of their occurrence among state declarations are: free speech (found in two), freedom of press (found in ten), freedom of assembly (found in four), right to bear arms (found in four). For a list of other popular rights see B. SCHWARTZ, *supra* note 25, at 89.

36. *See* T. CURRY, *supra* note 14, at 219 (arguing that most desired general Protestant ethos and morality in government).

37. It is interesting to note that even today, all 50 state constitutions contain provisions protecting "freedom of worship." Only 34 mandate limitations on religious establishment. *See infra* note 209.

38. For example, Rhode Island allowed for all protestant sects, while Massachusetts mandated church establishment but allowed towns to choose the church. CASES ON CHURCH AND STATE IN THE UNITED STATES 27-28 (M. Howe ed. 1952). *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 63-80 (1953). For discussions of the various colonial schemes, see A. STOKES, CHURCH AND STATE IN THE UNITED STATES 358-444 (1950).

39. Common elements among schemes for protecting religious freedom included explicit protection of the freedom of conscience and *localized control* of religious establishment. Many states simply adopted a nonpreferentialist approach with respect to the various Christian denominations. The standard New England argument in favor of established churches was that religion was necessary for civil society and therefore should be promoted. There was no violation of conscience so long as no one was forced to pay for a religion not his own. M. CURTIS, No STATE SHALL ABRIDGE 203 (1968); *cf.* L. LEVY, *supra* note 13, at 2 (inadvertent concession in coexistence of religious liberty and establishment by arguing that John Adams' espousal of establishment was of a "slender [establishment]"). *See also* A MEMOIR OF THE LIFE AND TIMES

untested concept, and the few polities which embraced some separationist principles were at great disagreement as to the extent and reason for the separation. Even the most limited nonestablishment principles by no means enjoyed widespread recognition among the states or the American people.

Responses resulting from ratification debates are another source of eighteenth century popular opinion. Five states sent proposals to Congress recommending that certain protections be incorporated into the Constitution.[40] Again, religious liberty took the lead as the most commonly recommended guarantee among those endorsed by ratifying states.[41] The focus of these proposals was protection of free exercise. Only the wording of New Hampshire's recommendation could reasonably be construed to advocate church/state separation: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[42] Even so comprehended, however, this clause was clearly not meant to espouse separation of church and government generally, as at the time of ratification, New Hampshire citizens were required to provide financial support to local churches.[43] Instead, only national impotence was contemplated. Recorded debates at the various ratifying conventions confirm the federalism based intent of state recommendations regarding religious liberty.[44]

### 2. *Framing the First Amendment*

> A rule of law should not be drawn from a figure of speech.
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> —Justice Reed, 1948[45]

In 1788, the First Congress drafted the Bill of Rights in an effort to allay fears that too much power might be appropriated by a distant national government.[46] Federalism concerns dictated that the amendments would serve

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OF THE REVEREND ISAAC BACKUS 210 (1958) (similar claim regarding Yale president Ezra Stiles). *But see* Jones, *Writings of the Reverend William Tennent, 1740-1777,* 61 S.C. HIST. MAG. 197 (1960) (discussing Presbyterian minister's claim that all establishments are an infringement of religious liberty).

40. *See* B. SCHWARTZ, *supra* note 25, at 120-57 for a discussion of the recommendations from Massachusetts, South Carolina, New Hampshire, Virginia and New York.

41. *Id.* at 157.

42. *See* 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (1937).

43. L. LEVY, *supra* note 13, at 24-25. New Hampshire's "multiple establishment" allowed local citizens to choose the church their community would support. In most cases this effectively established Congregationalism. *Id.*

44. *See, e.g.,* Speech by James Madison, *reprinted in* 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (1888 ed.) (Madison stating at Virginia's ratifying convention, "There is not a shadow of right in the general government to intermeddle with religion. . . . It is better that this security should be depended upon from the general legislature, than from one particular State. A particular State might concur in one religious project.").

45. McCollum v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

46. *See generally* C. KENYON, THE ANTIFEDERALISTS (1985); H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981); *see also* Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431, 431 (1926) (arguing that state authority was jealously preserved in areas of local interest).

the dual purposes of protecting personal rights *and* restricting federal power. This distinction is rarely so clearly exemplified as it is in the religion clauses of the Bill of Rights—the free exercise clause protects an individual right to religious freedom, the establishment clause restricts federal power to subvert state policies for protecting that right.[47] Americans were convinced that church and state issues had been satisfactorily settled by the various states.[48] The words "Congress shall make no law respecting an establishment of religion," therefore, did not reflect a shared concept of a "wall of separation," a metaphor coined years after the Bill of Rights was ratified,[49] but instead expressed a prohibition against any federal action which tended either to establish or disestablish a state church.

The term "respecting" has been expansively construed to incorporate any church/state interaction as opposed to an actual "establishment." While this broadened interpretation may be justifiable, it cannot support an extension of nonestablishment concepts to states. The establishment clause was an explicit restriction on the federal government's power to meddle in the religious establishments that then existed. Any expanded understanding of "respecting" must be based on this limited focus. Properly understood then, "respecting an establishment" could be rephrased, "having to do with state and local religious establishment policies." Obviously, an expansion of this phraseology, even if possible, would have to constitute less, not more, federal ability to dictate establishment policies.[50]

The framers of the religion clauses entered into debate in an attempt to codify the prevailing policies and principles regarding religious liberty and government. Commentators have pointed to various historical statutes and personalities to promote a particular view of dominant 19th century church/state separation theory.[51] The first amendment, however, does not represent

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47. Chancellor Kent argued that the only right protected in the religion clauses was free exercise and enjoyment of religious profession and worship; not freedom *from* others. 4 J. KENT, COMMENTARY ON THE CONSTITUTION 216 (1873). *See also* Paulsen, *supra* note 16, at 323-24 (both clauses represent one substantive right).

48. *See* T. CURRY, *supra* note 14, at 194.

49. Jefferson used the image in a letter to the Baptists of Danbury, Connecticut, fourteen years after the first amendment was drafted. 16 JEFFERSON'S WORKS 281 (Monticello ed. 1903). *See also* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (discussing the "short note" to the Danbury Baptists, "[T]he Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); J. REICHLEY, *supra* note 5, at 111 (more thorough discussion of letter to Danbury Baptists).

Jefferson actually borrowed the terminology from Roger Williams. *See* M. HOWE, *supra* note 14, at 5-6; P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 89, 98 (1953).

50. *But see* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such an establishment . . . ." (emphasis in original)).

51. For criticism citing history supporting a nonpreferentialist position or a more narrow view of establishment, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT; FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES

the triumph of one party or viewpoint. The important truth to be gleaned from the relevant history is not found in a particular theory, but in the fact that there *was no consensus* on proper church/state relations.[52] The only agreement was that the issue was properly left to the state and local governments and that the federal government should therefore have no legislative authority in the area. Religious liberty was supported by the establishment clause through a diffusion of power and a scheme which insured a polity's right to select its own form of religious establishment.

Legislative history surrounding the framing of the first amendment is fairly extensive,[53] and supports this understanding.[54] House debates reveal a shared understanding that the establishment clause was intended to limit *national* power.[55] Even a clause requiring state acknowledgment of free exercise rights

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(1964); R. CORD, *supra* note 14, at 214-39; E. CORWIN, *supra* note 14, at 88-118; McClellan, *The Making and the Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM (1981); J. DRAPER & F. WATSON, *supra* note 28; M. MALBIN, supra note 3, at 1-17, 39-40; W. MCGLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION (1976); J. O'NIELL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949).

For views claiming a broad interpretation of establishment, see I. BRANT, JAMES MADISON, THE NATIONALIST, 1780-1787 (1948); Dixon, *Religion, Schools and the Open Society*, 13 J. PUB. L. 267 (1964); Pfeffer, *The Case for Separation*, in RELIGION IN AMERICA: ORIGINAL ESSAYS ON RELIGION IN A FREE SOCIETY (J. Cogley, ed. 1968); L. LEVY, *supra* note 13, at 165-85. Some critics opine that several of this nation's founders supported religious influence in government. Era legislation is cited for the proposition that there was intent to support religion generally. The Northwest Ordinance, for example, is often cited because of its entreaty for encouragement of religion while providing for full religious liberty. Article I of the ordinance states: "No person . . . shall ever be molested on account of his mode of worship or religious sentiments in said territory." Article III states, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *See* P. SCHAFF, CHURCH AND STATE IN THE UNITED STATES 119 (1888). What was once mandated is now proscribed.

52. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 834 (1978) (arguing that Court is mistaken in its exclusive reliance on Jeffersonian concepts of church/state separation); Paulsen, *supra* note 16, at 322 (incoherence in establishment clause jurisprudence is result of Court's reliance on conflicting Madisonian and Jeffersonian separation concepts).

53. The religion clauses were given more attention than any other provisions in the Bill of Rights. *See* 1 ANNALS OF CONG. 420 (Gales & Seaton eds. 1789) [hereinafter ANNALS]; L. TRIBE, *supra* note 52, at 819.

54. *See* Snee, *supra* note 16, at 371-94 for an excellent summary of relevant legal history.

55. There are no minutes from Senate hearings, but their changes to House proposals suggest a general attempt to group the numerous House clauses and refine the verbose wording. *See* T. CURRY, *supra* note 14, at 214 (arguing that the Senate changes were merely in composition, "not substance").

Bernard Schwartz describes the Senate changes as "substantial improvements," excepting only what he sees as a weakened provision on religious freedom. B. SCHWARTZ, *supra* note 25, at 184-85. Responding to Schwartz, it is interesting to note that the Senate made all the revised amendments more succinct except for that regarding religious freedom. It is unlikely that this conscious and deliberate lengthening of the religion clause was a clumsy slip into less effective wording. The longer, yet more precise Senate version of the religion clause is better seen as a general attempt to limit and define the scope of disestablishment. The new version read, "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting

was rejected in a vote of confidence for the ability of states to protect liberty.[56]

Ironically, there was concern that future generations might misread the establishment clause as inhering too general a principle of disestablishment. Mr. Sylvester and Mr. Huntington expressed concern that the language used might tend to hurt the cause of religion altogether, "a construction different from what had been made by the committee."[57] Madison offered a potential solution to this difficulty by suggesting that the clause be amended to specifically proscribe a "national" establishment, thereby "point[ing] the amendment directly to the object it was intended to prevent."[58] Madison's proposal was defeated due to distaste for the word "national," but the colloquy which took place supports the limited meaning properly ascribed to the clause.

Bill of Rights ratification debates make little mention of the establishment clause.[59] This silence, however, is not without import. All the states with established churches ratified the amendment without any expressed concern.[60] Lack of debate on the religion clauses indicates that they were understood to have no adverse effect on state authority. In fact, the inverse is true, because the establishment clause was a specific protection of state authority. In this way, the establishment clause most closely resembled the tenth amendment.[61] While the tenth amendment protected state legislative competence generally, the establishment clause specifically and obdurately protected that authority in the area of religion. The establishment clause is thus primarily an embodiment of a principle of federalism with respect to church/state relations. Indeed, the specific proscription of the first amendment makes

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the free exercise of religion, . . . ." *See id.* In a compromise agreement, a House-Senate conference committee finally chose phrasing closer to that of the House, while the Senate version prevailed on all other provisions as did the Senate's grouping of clauses within the first amendment. *Id.*

56. 1 ANNALS, *supra* note 53, at 685.

57. 1 ANNALS, *supra* note 53, at 729. Huntington later elaborated on the concern, giving an example that a misreading of the clause might make some think that they could not be compelled to support ministers or the building of a meeting house. *Id.* at 758. Huntington feared that even states might be inhibited from furthering or establishing a religion. *No one* argued that such an intent would be appropriate. They only sought to preclude such a misreading.

58. *Id.*

59. B. SCHWARTZ, *supra* note 25, at 187. Even news articles were silent regarding the religion clauses. *Id.*

60. Some scholars have noted the fact that several states with establishments ratified the amendments late. *See* L. LEVY, *supra* note 13, at 83. There is no evidence, however, that the reason for this was concern over the establishment clause. Evidence suggests that Massachusetts agreed to the amendments before ratification but failed to forward its decision because of administrative errors. B. SCHWARTZ, *supra* note 25, at 189-91.

61. Wilber Katz has stated, "It seems undeniable that the First Amendment operated, and was intended to operate, to protect from Congressional interference the varying state policies of church establishment. The Amendment thus embodied a principle of federalism." W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1964).

for a stronger claim against government involvement in religious establishment than any other state right embraced by the tenth amendment.[62]

### 3. *Early 19th Century Understanding*

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensible supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens.
>
> —George Washington, 1796[63]

There is little doubt that the first amendment initially reflected a federalism-based policy of exclusive state authority over the subject of religion.[64] Some would claim, however, that the first amendment's "incomplete" assertion of disestablishment principles is a flaw resulting from the nascent state of the nation's experience with nonestablishment and the enlightenment of its citizens. They suggest that the country's more progressive thinkers, i.e., Madison and Jefferson, clearly favored disestablishment.[65] While not devoid of merit, this simplistic perspective reveals a lack of understanding with respect to the views of the framers.[66]

James Madison desired more restraint on state ability to violate religious freedom, yet his rejected proposal of a state-oriented free exercise amendment, unlike its federal counterpart, contained no parallel restriction on religious establishment.[67] This conspicuous omission demonstrates that even Madison, an undisputed nationalist and leader in the area of church and state policy, did not view general disestablishment as a necessary prerequisite

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62. *See* Snee, *supra* note 16, at 406-07.

63. *See* J. REICHLEY, *supra* note 5, at 103.

64. Justice Story stated: "Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions." J. STORY, *supra* note 29, at 116. Story is often cited for his argument favoring a restricted interpretation of establishment generally. It is interesting to note that this view is expressed as an *argument,* however, and thus opens itself to counter-claims. Conversely, Justice Story needed to make no argument in support of his statement about the federalism foundations of the establishment clause. Apparently he assumed agreement as to its federal intent, and the policy needed no defense.

65. *See* L. LEVY, *supra* note 13, at 38-39, 79-90. *See generally* B. SCHWARTZ, *supra* note 25. Schwartz and Levy both describe the evolution of the first amendment as if it were a "discovery" in which the nation gradually came to realize that there was a two-fold aspect to freedom of religion. A more accurate narrative is that the nation learned better and more efficient ways to guarantee *one* right: freedom of conscience.

66. While the church/state views of both Madison and Jefferson are difficult to discern, and somewhat inconsistent, the same can not be said for their views on the federalist component of the first amendment. D. DREISBACH, *supra* note 16, at 101-08.

67. James Madison originally proposed an amendment prohibiting state violation of freedom of conscience, freedom of press, and the right to jury trial. B. SCHWARTZ, *supra* note 25, at 233. The proposed amendment was defeated in the Senate. *Id.* at 182. *Cf.* J. REICHLEY, *supra* note 5, at 108-09 (discussing the incorrect assertion by Madison's biographers, Irving Brant and Walter Berns, that Madison's original amendment would have eliminated state establishments).

for religious liberty.[68] While Madison's *Memorial and Remonstrance* indeed suggests a push toward more complete separation in Virginia, nonpreferentialists[69] have asserted that it is more accurately seen as an argument against discriminatory advancement of one religion.[70] More importantly, Madison's struggle to disestablish the Anglican church does not undermine the fact that he viewed disestablishment as a policy matter properly decided by state polities. The only right discussed in the *Memorial* is the "unalienable right" to free exercise of religion.[71]

Thomas Jefferson, widely recognized as the most vigorous advocate of church/state separation and author of the "wall of separation" metaphor,[72] had a similar understanding of the federalism principles inherent in the establishment clause. As President of the United States, first amendment principles precluded Jefferson from declaring customary fast and thanksgiving days as previous presidents had done.[73] Yet, as a state legislator, Jefferson demonstrated his understanding that states should be free to legislate in religious matters by voting in favor of a bill empowering Virginia's governor to make such declarations,[74] by himself decreeing a day of prayer as governor,[75] and by advocating use of a city court house for Sunday worship services.[76] At his second inaugural address Jefferson stated:

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68. *But cf.* Letter of E. Livingston, July 10, 1822, *in* 9 WRITINGS OF JAMES MADISON 100 (1865) (claiming that in spite of fast day proclamations, Madison would have preferred "perfect separation"). While he did not espouse separationist policies politically or as a constitutional matter, it is not unreasonable to conclude that, personally, Madison would not have been hesitant to support even local establishments. *See, e.g.*, 1 WRITINGS OF JAMES MADISON 153-54 (1865) (Madison stating in a letter, "it gives me much pleasure to observe by 2 printed reports sent me by Col. Grayson, that, in the latter, Congress had expunged a clause contained in the first, for setting apart a district of land in each Township for supporting the Religion of the majority of inhabitants"); M. MALBIN, *supra* note 3, at 16 (Madison opposed Virginia's tax distributions to all church denominations). In spite of these specific situations, most agree that Madison would not require strict neutrality between religion generally and irreligion. *Id.*

69. Nonpreferentialism is a view which interprets the establishment clause to call for government neutrality with respect to various churches or denominations, but not necessarily religion generally. *See generally* L. LEVY, *supra* note 13, at 162-65, for a criticism of nonpreferentialism.

70. D. DREISBACH, *supra* note 16, at 102, 146-50.

71. It is interesting to note that *Remonstrance* supporters were essentially battling a religious *minority*. Even the *Remonstrance* leaves open the possibility of enacting such an establishing bill with "the clearest evidence that it is called for by a majority . . . ." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (presented to the General Assembly of the Commonwealth of Virginia), in II THE WRITINGS OF JAMES MADISON 183-91 (Hunt ed. 1901-1910).

72. *But see* M. HOWE, *supra* note 14, at 6 (arguing that Roger Williams, with his primarily evangelical/theological motivation for separation, played a larger role in making the "wall" a constitutional barrier than did Jefferson, with his political orientation); J. KENT, *supra* note 47, at 216 (arguing that Roger Williams set the stage for religious liberty).

73. H. RANDALL, THE LIFE OF THOMAS JEFFERSON 2 (1855).

74. Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 656-66.

75. D. DREISBACH, *supra* note 16, at 109.

76. Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), *reprinted in* M.

> In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the *General* government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it, but have left them as the Constitution found them, under the direction and discipline of *State* and Church authorities. . . . (emphasis added)[77]

It is paradoxical that the Supreme Court selectively invokes Jeffersonian views to enjoin state involvements with religion, while ignoring the federal entanglements he so vehemently opposed.[78]

The Virginia and Kentucky Resolutions provide additional examples of both Madison's and Jefferson's views on the important federalism concept embodied in the establishment clause. In each, a comparison was drawn between religion and free speech and press rights.[79] It was claimed in the Resolutions that if the federal government could encroach on state authority to protect speech and press, then religion might be next. It seems that religion was viewed as the quintessential example of an appropriate area for application of federalism principles.

### *B. The Fourteenth Amendment*

It would be inappropriate to claim that any specific church/state separation policy emerged during the framing of the Bill of Rights. The two prevailing doctrines inherited through the first amendment were the prominence of free exercise as a fundamental right, and the importance of federalism in ensuring that local religious policies would not be subverted by the whims of national leaders.[80] This understanding did not change prior to the Civil War.[81] Current

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PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 1463-65 (1960).

77. 8 THE WORKS OF THOMAS JEFFERSON 42 (H. Washington ed. 1884), *reprinted in* W. SKOUSEN, THE MAKING OF AMERICA, THE SUBSTANCE AND MEANING OF THE CONSTITUTION 687 (1985).

78. *See* Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1112-18 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985), for a discussion of the views of Madison and Jefferson and a review of establishment clause framing.

79. *See* 1789 KENTUCKY ACTS, 1st Sess., 7th Gen. Assembly (Nov. 10, 1798); 2 SHEPHERD, ED., THE STATUTES AT LARGE OF VIRGINIA 192-93 (1835); 4 ANNALS OF AMERICA 63 (1968).

80. The presumption that the first amendment's provisions properly restrain the executive and judicial branches has never been seriously questioned. Surprisingly, it has also never been comprehensively discussed. Early on, the framers made clear their broader understanding of congressional injunction applicability throughout the federal government. In the Kentucky resolution, Thomas Jefferson said "[church-state decision-making authority is] withheld from the cognizance of Federal Tribunals," 4 THE ANNALS OF AMERICA 63 (1968). Justice Story argued, "[A civil magistrate is] bound indeed to protect the established church, . . . ." J. STORY, *supra* note 29, at 591. *Cf.* United States v. Ballard, 322 U.S. 78 (1944) (first amendment applied to judicial proceedings).

81. Professor Howe states that "it was the unquestioned assumption of everyone before the Civil War, . . . that the making of a controlling law with respect to the power of churches was the responsibility of each state—never the federal government . . . ." M. HOWE, *supra* note 14, at 70.

applications of the establishment clause rely on the Fourteenth Amendment's effects on the Bill of Rights. The legal question that remains, then, is whether this Reconstruction amendment somehow transforms the federalist character of the establishment clause.

*1. Incorporation Doctrines*

Ratified in 1868, the fourteenth amendment was designed to safeguard the civil rights of recently emancipated black Americans.[82] The amendment's greatest effect on constitutional law, however, has occurred in the last fifty years with the development of "incorporation" doctrines. While a better case for incorporation can probably be made via the amendment's "privileges and immunities" clause, current doctrine holds that the "due process" clause incorporates many of the rights found in the first eight amendments and thus makes them applicable to the states.[83] The Supreme Court has never unanimously agreed on one theory regarding incorporation, but the result of its decisions has been a "selective incorporation" of most provisions in the Bill of Rights. This "selective incorporation" has included the establishment clause.[84]

For the last forty years the issue of Bill of Rights incorporation has been the subject of fervent debate. Scholars have developed exegeses demonstrating intent to prevent state encroachment on Bill of Rights protections and, conversely, intent to guarantee only those rights subsumed by the earlier Civil Rights Bill.[85] This Article does not attempt to enter the debate, but

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82. *See, e.g.*, M. CURTIS, *supra* note 39, at 56 (noting that petitions commonly reflected a desire to safeguard the right to bear arms, free speech, the right of assembly and free press for blacks). There were apparently no serious claims that blacks had been deprived of religious liberty. *Id.*

83. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 49 (1985) (relying on due process clause to incorporate first amendment); Twining v. New Jersey, 211 U.S. 78 (1908) (jury instruction impacting right to be free from self-incrimination was allowed though Court suggested more fundamental rights might be incorporated).

84. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

85. Justice Black initiated debate with the view that the fourteenth amendment totally incorporated the first eight amendments to the Constitution. *See* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). Other commentators who argue in favor of incorporation include: H. ABRAHAM, FREEDOM AND THE COURT (1982); M. CURTIS, *supra* note 39; H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW (1982); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6. HARV. J. ON LEGIS. 1 (1968); Crosskey, *Charles Fairman, 'Legislative History' and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982).

Commentators who argue against incorporation include: A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962); Alfange, *On Judicial Policy Making and Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978).

instead presumes the validity of the Supreme Court's doctrine of "selective incorporation" involving rights of a particularly "fundamental" nature. Under selective incorporation, the question becomes one of whether the establishment clause is properly catalogued as constituting a "fundamental right."

### 2. *The Establishment Clause Distinguished*

On its face, the Court's decision to import nonestablishment as a "fundamental right" seems semantically difficult at best.[86] Upon review of first amendment history, however, such a construction is not only inappropriate, but virtually prohibited. The only "right" embodied in the clause would be the right to have one's state free to establish a religion. It is thus nonsensical to incorporate the establishment clause in much the same way it would be illogical to incorporate the tenth amendment.[87] The clause is a specific prohibition on the federal government which does not parallel an individual right, but a state right.[88] The individual right involved, namely religious

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86. While other freedoms found in the first amendment can be seen as "privileges" or "rights" under the fourteenth amendment with little semantic ingenuity, the establishment clause is simply a restriction on the federal government. J. REICHLEY, *supra* note 5, at 135; Paulsen, *supra* note 16, at 323. *But see* Flast v. Cohen, 392 U.S. 83 (1968) (concluding there to be a fundamental personal right not to be a part of a community whose official organs endorse religion); Abington School Dist. v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) (the establishment clause prohibits the state from inhibiting the "freedom of choice by diminishing the attractiveness of either alternative . . . [sectarian vs. "religion-free" education]); L. LEVY, *supra* note 13, at 168 (arguing "freedom of" incorporates "freedom from").

It is recognized that any restriction can be viewed as a right. It does not follow, however, that protection of a right dictates that a given restriction (e.g., no establishment) should apply with equal force to both federal and state governments. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 4. Limitations on the federal government's ability to tax individuals indirectly reflected an individual right to be free from excessively burdensome taxation, but this structural provision did not mean that states were equally enjoined from taxing citizens. Because state governments more closely represented the people, their authority was greater. Federalism principles allocate governmental authority to the level at which it can be most efficiently used in the best interests of the people.

87. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. CONST. amend. X. No one has argued that this amendment could or should be applied to the states. It is conceivable that a state constitution might contain a similar provision which extended federalism principles to protect towns or counties, but deriving such a mandate from the tenth amendment would be semantically impossible. Likewise, a parallel to the establishment clause could conceivably arise in a state constitution, but the appropriate meaning simply cannot be derived from the first amendment. *See* W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120-30 (1825) (arguing for application of the Bill of Rights against states while excluding the first amendment from such application); Snee, *supra* note 16, at 372 (distinguishing establishment clause with respect to incorporation). *Cf.* Flast v. Cohen, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting) (suggesting that standing arguments regarding ninth and tenth amendments would be similar to that for establishment clause).

88. Being true to the meaning of the establishment clause, to apply its principles to states

liberty, is "protected" by the clause only through its ability to prevent federal frustration of local legislative competence in religious matters.[89] A court injunction against state action is exactly the frustration the establishment clause attempted to preclude.

It should be emphasized that the free exercise clause is not shackled with the same characteristics that makes establishment clause incorporation so irrational.[90] Functionally, the establishment clause was designed to provide states with an additional safeguard to complement the tenth amendment. The free exercise clause, however, clearly contemplates a substantive right. In fact, it was suggested in the First Congress that the states be required to respect free exercise. More importantly, the free exercise right was universally acknowledged at the framing of the first amendment and was constitutionally protected in every state. Described by Madison as an "unalienable right," the free exercise principle clearly falls into the category of rights considered "fundamental" at the framing and during the reconstruction. While free exercise was probably seen as the most fundamental right, the nonestablishment injunction was the single most explicit distribution of civil authority.

### 3. *Incorporationist Arguments*

Arguments in favor of general incorporation often rely on a premise that Republicans in the 39th Congress believed that much of the Bill of Rights already applied to states prior to the Civil War.[91] This assumption presumably explains the lack of incorporation discussion during the fourteenth amendment's framing. Regardless of the argument's validity, it does little to salvage establishment clause incorporation because at that time no one could have reasonably believed the clause applied to states.[92] Indeed, it would seem that any intent to incorporate some type of nonestablishment principle would, at

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would mean restricting state authority to legislate in ways that might hamper local town and city church establishments. The clause would possibly be worded, "States cannot legislate in such a way as to benefit or hinder town or county religious establishments."

The unfortunate use of the word "respecting" can and has caused confusion in this regard. *See* Paulsen, *supra* note 16, at 321 (term intended to prevent negative inferences, i.e., Congress is not only enjoined from establishing a church, but also from *dis*establishing state churches). Some state constitutional provisions which facially mirror the first amendment obviously intend a different meaning for the word "respecting." Perhaps the cavalier use of the word in later state constitutions reflected the narrow interpretation of "establishment" which earlier existed at the federal level.

89. *See* T. CURRY, *supra* note 14, at 204-05 (discussing belief that established religion violated free exercise).

90. *See* J. REICHLEY, supra note 5, at 135 (view that limiting incorporation of establishment clause is inconsistent with extending free exercise clause is supported by "neither logic nor experience"); Snee, *supra* note 16, at 371-73 (arguing against incorporating establishment clause while allowing incorporation of free exercise clause).

91. *See, e.g.*, M. CURTIS, *supra* note 39, at 43-47, 100-05.

92. *Cf.* Speech by Senator Bingham, CONG. GLOBE, 42d Cong., 1st Sess. 2542 (1871) ("[T]his amendment takes from no State any right that ever pertained to it.").

the very least, first require an articulation of what that principle was.[93]

Admittedly, the fourteenth amendment brought about major adjustments in federalism concepts. The Bingham and Howard speeches before Congress, which have been used to support the legitimacy of incorporation, reveal a desire to arrest state encroachment on fundamental rights.[94] Religious establishment policies, however, were never violations of rights, but rather time-honored methods for protecting those rights. In one speech by Senator Howard, the list of rights he considered to be "privileges and immunities," excluded both nonestablishment and religious freedom.[95] Indeed, unlike the racial problems which precipitated the reconstruction amendments, church and state had become *less* entwined since the framing. Experience did not call for a reworking of this area of constitutional law. Through democratic procedures, religious groups were able to retain the ability to influence government, while free exercise principles protected minority views. Any congressional concerns would have had to focus on these free exercise rights.[96]

Congress' rejection of the Blaine amendment[97] would appear to be dispositive on the issue.[98] Considered several times by both the House and the

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93. *See* W. KATZ, *supra* note 61, at 11 ("The dearth of evidence as to the restrictions imposed by the 'no establishment' clause in federal territory means a dearth of evidence as to the meaning with which the clause was 'incorporated' (as the phrase goes) into the Fourteenth Amendment."). Evidence suggests that what little late nineteenth century understandings of the establishment clause there were narrowly construed the establishment restriction and then only as a proscription against interference with state authority. *See* L. TRIBE, *supra* note 52, at 826 (discussion of narrow 19th century definition of establishment). Antebellum case law evidences this understanding. *See* Terret v. Taylor, 13 U.S. (9 Cranch) 42 (1815) and Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844) (both suggesting a narrow definition of establishment).

94. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 151 (1871) (Bingham speech calling for a rereading of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) and its holding that the Bill of Rights did not limit the states); CONG. GLOBE, 39th Cong., 1st Sess. 1064-65 (1866) (speech espousing federal authority to enforce the Bill of Rights). While the argument presented here seeks to distinguish only the establishment clause, it should not be forgotten that there is a strong argument against accepting Bingham's views as dispositive of congressional understanding. In reply to Bingham's rereading of *Barron*, opponents stated that he could "make," but not "unmake," history. CONG. GLOBE, 42d Cong., 1st Sess. 151 (1871).

95. CONG. GLOBE, 39th Cong., 1st Sess. 2765.

96. State legislatures kept no records of ratification debates—only journals of motions and votes. *See* Fairman, *supra* note 85, at 82. Lack of state concern over a possible loss of church/state authority is again significant, but the import is reduced by the fact that no state at the time had an established religion, and no court had construed the clause to prohibit more than that. Therefore, even if a state ratified a prohibition on actual establishments, they ratified no more than that. *See infra* note 122.

97. *See* 4 CONG. REC. 5580 (1876). On December 14, 1875, Hon. James G. Blaine proposed the amendment as part of a movement to protect the public school system from what was perceived as a Catholic threat. President Grant had recommended such an amendment in his December 7, 1875, message to Congress. The proposed amendment read:

> No state shall make any law respecting the establishment of religion, or prohibiting the free exercise thereof; and no money raised by school taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect;

Senate,[99] the amendment was introduced only seven years after ratification of the fourteenth amendment and would have explicitly prohibited any state from establishing a religion.[100] The proposal's repeated rejection was accompanied by argument extolling state performance in protecting religious liberty and affirming the importance of federalism.[101] When proposed, congressional ranks included six senators and eight congressmen who had participated in drafting the fourteenth amendment.[102] All participants demonstrated a clear understanding of state authority in the area of religion,[103] and during the

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> nor shall any money so raised, or lands so devoted, be divided between religious sects or denominations.

*Id.* The amendment was eventually revised to include an injunction against the use of a broader range of public assets to support religious teaching and a provision ensuring the continued use of Bible-reading within public schools. *Id.* The proposed amendment was passed 180 to 7 in the House, but lost the necessary two-thirds vote (28 to 16) in the Senate. After its rejection, the tide turned the other way and there was a revival of government contribution to schools under sectarian control as well as proposed constitutional amendments recognizing Christianity nationally and petitions for federal Sunday-Rest legislation. *See* AMERICAN STATE ARTICLES 240-60 (1961); M. HOWE, *supra* note 14, at 130-31.

98. *See* O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798,* 4 WASHBURN L.J. 183, 186-96 (1965) for a discussion of what the amendment meant with respect to understandings of the fourteenth amendment and incorporation. *See also* Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response,* 44 OHIO ST. L.J. 1, 16-19 (1983) (arguing that Blaine amendment shows understanding of the people to be nonincorporation).

99. M. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION 182-83 (1929) (reporting that the bill had been reintroduced twenty times by 1929).

100. It has been argued that the proposed amendment may prove too much in that it would have enjoined state infringement of free exercise. *See* Abington School Dist.v. Schempp, 374 U.S. 203, 257 (1963) (Brennan, J., concurring). This argument is unpersuasive, however, considering the clear primary purpose of restricting state aid to parochial schools. Such a purpose is only fulfilled by a nonestablishment provision.

101. 4 CONG. REC. 5585 (1876). *See* O'Brien, *supra* note 98, at 186. *See also* Comment, *The Blaine Amendment and the Bill of Rights,* 64 HARV. L. REV. 939 (1951) (discussion of numerous proposals and rejections).

102. *See* Comment, *supra* note 101, at 942 n.14 (listing Senators and Congressmen who participated in both debates). Additionally, thirty-seven other representatives in the 44th Congress had been in legislative bodies of different states when the fourteenth amendment was debated for ratification. O'Brien, *supra* note 98, at 190.

103. Ironically, opposition to the proposed amendment relied on the thoughts of the same Thomas Jefferson who is cited as best articulating the necessity of strict separation. Senator Stevenson stated:

> Friend as [Jefferson] was of religious freedom, he would never have consented that the states, which brought the Constitution into existence, upon whose sovereignty this instrument rests, which keep it within its expressly limited powers, should be degraded and that the Government of the United States, a Government of united authority, the mere agent of the States with prescribed powers, should undertake to take possession of their schools and their religion.

4 CONG. REC. 5589 (1876) (statement of Sen. Stevenson). *But see* M. CURTIS, *supra* note 39, at 169-70 (arguing Blaine Amendment was reaction to Supreme Court cases and meant nothing with respect to incorporation or the framing of the fourteenth amendment).

debate, it was never intimated that the fourteenth amendment had any impact on a state's legislative competence with respect to religion.[104]

Moreover, the principle objection of opponents to the Blaine amendment, namely that it was "much better . . . to leave the State Governments to themselves,"[105] was the same objection to Madison's 1789 proposal requiring free exercise within states. Through decades of reconsideration of Blaine-type amendments, it was never argued that the first amendment of the Constitution could be applied against the states.[106] With respect to the establishment clause, such a suggestion would have simply made no sense.

By incorporating the establishment clause, the Supreme Court has assumed that the people of this nation wish to constitutionally require a policy that they have repeatedly and explicitly rejected. Some commentators have said that history, while not mandating incorporation, does permit it.[107] Individual rights rhetoric in the debates and the general thrust of the fourteenth amendment's privileges and immunities clause may indeed permit federal protection of the free exercise right, but this authority could not include permission to create a completely new meaning for the establishment clause. Not only has the federal nature of the clause been lost, but the entire concept of disestablishment has been expanded beyond anything even suggested at either the Framing or the Reconstruction.[108] This is especially significant considering the fact that the new interpretation effectively destroys federalism,[109] the principal mechanism for protecting religious liberty.

While many specific Bill of Rights incorporations have been criticized, none are so thoroughly contradicted by the historically discernible intentions of our forefathers than that of the establishment clause.[110] In 1865, as in

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104. *See, e.g.*, 4 CONG. REC. 5561 (1876) (Sen. Frelinghuysen speech) ("[The Blaine Amendment would] prohibit . . . the states for the first time, from establishment of religion."); M. HOWE, *supra* note 14, at 88 (arguing that 44th Congress thought states to be constitutionally immune from nonestablishment proscriptions). The *only* reference to the fourteenth amendment during the Blaine Amendment debate was in referring to an example of another poorly drafted amendment, lacking in specificity. 4 CONG. REC. 5585 (1876).

105. 1 ANNALS 755 (1789). *Compare with* 4 CONG. REC. 5245, 5246, 5262, 5268, and 5580-95 (1876).

106. O'Brien, *supra* note 98, at 200.

107. *See supra* note 17.

108. Accepting arguendo incorporation's alteration of the constitutional scheme, Lawrence Tribe states, "it remains at best ironic and at worst perverse to appeal to this history of the establishment clause to strike at practices only remotely resembling establishment in any core sense of the concept." L. TRIBE, *supra* note 52, at 819.

109. *But see generally* L. LEVY, *supra* note 13 (arguing that religious liberty was historically tied to church/state separation). This claim is controverted by colonial history. *See generally* J. REICHLEY, *supra* note 5. With numerous diverse religions to accommodate, it made more sense to have church/state decisionmaking authority in the hands of those who would be affected by it. The goal was not "separation," but instead enfranchisement of as many religious views as possible.

110. Incorporation of the establishment clause is inconsistent with all theories regarding Bill of Rights incorporation. Even under *full* incorporation, the establishment clause must be viewed,

1791, the American people realized that questions of religious establishment were best left to states and local authorities.[111] They saw wisdom in the theory that as government became more distant and centralized, the power to legislate with respect to the establishment of religion should diminish. Looking at the current situation, however, it seems this principle has been reversed.

## II. SUPREME COURT FIRST AMENDMENT JURISPRUDENCE

> Who controls the past controls the future,
> who controls the present controls the past.
> —George Orwell, 1949[112]

> But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.
> —Justice Felix Frankfurter, 1939[113]

### *A. Doctrinal Development*

*Everson v. Board of Education* began the Supreme Court's conflict with state governments by declaring that the fourteenth amendment incorporated the establishment clause so as to make it applicable as a restriction against the states.[114] *Everson's* progeny shows that states were thereby required to create a "wall of separation" between religion and government. Discussion within the *Everson* opinion focuses primarily on the definition of "an establishment of religion," and not on the appropriateness of incorporation.[115] Justice Black, an advocate of total incorporation, apparently saw no

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like the tenth amendment, as a provision which has no sensible application against states. *See* text accompanying note 61. Arguments proceed *a fortiori* with respect to selective incorporation or specific incorporation theories. *But cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 257 (1963) (Brennan, J., concurring) (arguing that mere "inattention" may have caused the fourteenth amendment's draftsmen to neglect explicating the nexus between the new amendments and the guarantees of the first amendment).

111. As in the case of the first amendment, ratification debates give only scant evidence in support of any popularly held view of incorporation. M. CURTIS, *supra* note 39, at 145-48.

112. G. ORWELL, 1984 (1949), *reprinted in* C. WOODWARD, AMERICAN ATTITUDES TOWARD HISTORY 20 (1968).

113. Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

114. 330 U.S. 1 (1947). Prior to the Reconstruction, the Supreme Court clearly understood the limited applicability of both religion clauses in the first amendment. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (provision for protecting citizens of respective states in their religious liberties is left to the state constitutions and laws); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 588, 609 (1845) (same).

115. "This case forces us to determine squarely for the first time what was 'an establishment of religion' in the First Amendment's conception; . . ." *Everson,* 330 U.S. at 29. While this Article criticizes *Everson* for its role in incorporating the establishment clause, it should be noted that, at the time of the decision, commentators generally focused instead on *Everson's* definition of establishment. M. KONVITZ, *supra* note 32, at 56. Incorporation was only an academic concern if establishment remained narrowly defined. *See* Snee, *supra* note 16, at 406 (concluding that incorporation of the establishment clause would become a problem only if the Court invalidated a state law).

need to explain the basis for including the establishment clause among those which had been assimilitated. The Court's only rationale extended from obiter dictum in the 1939 *Cantwell v. Connecticut* decision which incorporated the free exercise clause.[116] Citing free exercise incorporation and the complimentary nature of the clauses, Black simply stated, "there is every reason to give the same application . . . to the establishment of religion clause."[117] The logical deficiency is manifest, yet after forty years the Court has never justified its interpretation. Perhaps Justice Stewart explained it best when he stated: "[T]he Fourteenth Amendment has somehow absorbed the Establishment Clause."[118]

Historical analysis in defense of Supreme Court interpretations has regularly focused on the views of Madison and Jefferson with respect to church/state relations in Virginia.[119] Criticism of the Court's rationale has curiously sought to refine understanding of this same limited topic by pointing to inconsistencies in a total separation theory.[120] This criticism, while perhaps justified, misses the mark. Far more serious error can be found in the Court's focus in general. By looking solely to Madison and Jefferson, the Supreme Court has effectively imputed one state's historical treatment of religious establishment to an entire nation.[121] Compounded error is revealed by asking what theory of disestablishment would have been understood by the fourteenth amendment's framers who supposedly "incorporated" the establishment clause. Few would argue that by that time a Jeffersonian "wall of separation" had been commonly accepted. Antebellum case law better supports a nonpreferentialist[122] reading of the clause.[123] Ironically, it was the

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116. 310 U.S. 295 (1939). *Cantwell's* incorporation of the free exercise clause is arguably permissible based on the general doctrines inherent in the fourteenth amendment. *See supra* text accompanying note 90. These doctrines, however, do not permit the comparable extension of nonestablishment principles seen in *Everson*.

117. *Everson*, 330 U.S. at 15. For a detailed criticism of the Court's reliance on previous cases, see Snee, *supra* note 16, at 400-04.

118. Abington School Dist. v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting). Justice Stewart then points to the irony in restricting states with a clause "designed to leave states free to go there own way." *Id.*

119. *See* Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 139-41 (1962) (arguing that the first amendment reflects neither Madison nor Jefferson's views on church/state relations). Kruse also identifies the inadequate historical basis for incorporation but sanctions it based on an expansive understanding of judicial review. *Id.* at 141.

Some say that Court reliance on Madison and Jefferson is justified by the fact that they were the most brilliant, prolific church state theorists of their day. This may be true, but even their views differed, and both understood that the policies they espoused were not necessarily appropriate for all states. Both likewise understood the establishment clause to be about federalism, not proper church/state relations. *See* D. DREISBACH, *supra* note 16, at 107-11.

120. *See supra* note 14.

121. It should be noted that Black's source in the *Memorial and Remonstrance* was not even a state constitution, but merely a statute. P. MILLER, *supra* note 49, at 98 (1953).

122. Nonpreferentialism is a popular view among Supreme Court critics which interprets the

purpose of facilitating state-based solutions to church/state problems which precipitated the establishment clause.

Total separation of church and state is an ill-conceived notion which, at its logical extreme, cannot coexist with religious liberty.[124] More recent cases following *Lemon v. Kurtzman* recognize this and have attempted to deal with the tensions through a three-pronged test—a test which has notably never been applied to federal legislation.[125] The *Lemon* Court's three step analysis of questioned legislation includes: scrutiny of a law's intent, its primary effects, and the extent of consequent church/state entanglement. None of these considerations speak to the "right" of free exercise. Neither do they acknowledge any of the federalism concerns found in the establishment clause. Their only foundations lie in an incomplete exegesis of Thomas Jefferson's writings.

### *B. Emerging Conflicts: The Prospect for Change*

> [I]f the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.
>
> —Abraham Lincoln, 1861[126]

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establishment clause to call for government neutrality with respect to various churches or religious denominations, but not necessarily a complete separation of government and religion generally or neutrality between religion and irreligion. *See, e.g.*, Wallace v. Jaffree, 482 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (establishment clause did not require "neutrality between religion and irreligion nor did it prohibit the federal government from providing nondiscriminatory aid to religion"); J. REICHLEY, *supra* note 5, at 166 (first amendment is not neutral on the value of religion). *See also* J. DRAPER & F. WATSON, *supra* note 28, at 99 (describing the Baptist position as one of "separation of Church and State, not separation of Christianity or the Bible and the State"); Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROBS. 3, 10 (1949) (the Supreme Court's doctrine on the unconstitutionality of government aid to all religions is "untrue historically . . . *all [the establishment clause] does is to forbid Congress to give any religious faith, sect, or denomination a preferred status*" (emphasis in original)). Justice Story once said:

> Few persons would think it unreasonable to encourage or foster the Christian religion generally as a matter of sound policy. . . . Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence.

J. STORY, *supra* note 29, at 603-05. Story went on to claim that the "universal sentiment of America at the founding was that Christianity ought to receive encouragement from the states." *Id.* at 605.

123. *See* J. REICHLEY, *supra* note 5, at 115 (discussing various court decisions holding "general" Christianity to be part of common law).

124. *See* L. TRIBE, *supra* note 52, at 815; Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1374 (1981).

125. 403 U.S. 602 (1971); *see also* Edwards v. Aguillard, 480 U.S. 578 (1987) (three-prong test used to strike down "creation science" statute).

126. 2 ABRAHAM LINCOLN: COMPLETE WORKS 5 (J. Nicolay & J. Hay eds. 1920) (First Inaugural Address, delivered in 1861).

Justice Stewart, in his dissent to *Abington School District v. Schempp,*[127] acknowledged the establishment clause's status as a protector of state authority and the "uncomfortable" nature of incorporation. Unfortunately, he was never able to obtain support from other members of the Court and his criticisms received little attention. Years of unsatisfactory adjudication have bequeathed us the wisdom of experience, however, and several of today's justices have begun to see both the historical error and the policy misjudgments inherent in current establishment clause jurisprudence.[128]

Justice O'Connor has several times expressed misgivings about the Court's *Lemon* test.[129] Justice Rehnquist has also pointed to the Court's accumulated errors on more than one occasion. In his dissent to *Wallace v. Jaffree,*[130] Rehnquist identified the inconsistent application of prayer restrictions with respect to federal and state actions.[131] Without rejecting incorporation *per se,* he recognized the tension inherent in current doctrines and provided historical analysis which gave credence to a lower court claim that the establishment clause was wrongly incorporated. Justice Scalia also suggested a step away from incorporation and toward federalism when he stressed the value and importance of deference to state judgment in his dissent to *Edwards v. Aguillard.*[132] Scalia, again without going so far as to reject incorporation, noted that the very reason the federal government was prohibited from establishing a religion was to safeguard state religious policy-making. Justice White joined the ranks of the discontent in his dissent to *Wallace v. Jaffree.*[133] After acknowledging his appreciation for Justice Rehnquist's historical analysis, Justice White stated: "Against that history, it would be quite under-

127. 374 U.S. 203, 286 (1962) (Brennan, J., concurring).

128. Besides judicial figures, the public has also demonstrated an increasing dissatisfaction with the gradual erosion of our Judeo-Christian roots. Twenty-eight years ago, John F. Kennedy's campaign assured the electorate that his religion would not influence American politics. All three candidates in 1980 declared themselves to be ardent Christians. *See* F. COLUMBO, GOD IN AMERICA 2 (1984). The public reaction to Supreme Court establishment clause policies has had currency in Congress as well. In the 97th Congress there were attempts to restrict federal court jurisdiction in two important areas implicating church/state policy: school prayer and abortion. Proponents of the restrictions apparently thought state tribunals would be more appropriate fora for issues of morality and religion. P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 378 (3d ed. 1988).

129. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring). Justice O'Connor instead proffers an effects test which looks to the result of legislation as opposed to the intent or entanglement. It should be noted that O'Connor has expressed general dissatisfaction with current doctrines and not specific concerns regarding incorporation.

130. 472 U.S. 38 (1985).

131. *Id.* at 103-05 (Rehnquist, C.J., dissenting).

132. 482 U.S. 578, 610 (1987). Justice Scalia also alluded to other potential arguments, stating, "I will not go on to discuss the fact that, even if the Louisiana legislature's purpose were exclusively to advance religion, some of the well established exceptions . . . might be applicable." *Id.* at 635 (Scalia, J., dissenting).

133. 472 U.S. 38, 91 (1985).

standable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause."[134] Finally, the newest member of the Court most pithily confirmed the Court's malaise in *Allegheny v. ACLU.*[135] Justice Kennedy, stressing the fact that "he did not wish to be seen as advocating [*Lemon*]", simply stated, "substantial revision of our Establishment Clause doctrine may be in order."[136]

Though it is not being asserted that any Justice is currently rethinking establishment clause incorporation, the presence of dissatisfaction may open some doors. In 1984, Judge Brevard Hand explicitly addressed the issue and called for disincorporation of the establishment clause.[137] Unfortunately, Judge Hand's historical argument led to the conclusion that incorporation in general was unconstitutional. Hand's chutzpa was met by a unanimous Supreme Court rejection of the idea that "the Federal Constitution imposes no obstacle to Alabama's establishment of religion."

Clearly, *Everson* was wrongly reasoned, but proper historical analysis need not go so far as to reject incorporation generally. Instead, it must only reject incorporation of the establishment clause.[138] Likewise, disincorporation need not remove all obstacles to state establishment; free exercise jurisprudence can invalidate establishments which undermine religious liberty. Most importantly, the argument for disincorporation need not rely solely on original intent and the judicial philosophies which place a premium on it. The final section of this Article identifies significant policy *benefits* of the federalist scheme.

While several Justices have admittedly assumed a posture of absolute intransigence on the issue, the possibility of reversing establishment clause incorporation should not be treated as a dead issue. Changes in the Court and its continued inability to develop a cohesive body of law portend a significant movement in the future. Discreet adjustments to the *Lemon* test, however, are not the answer. The Court, instead, must realize that it has failed to devise a comprehensive and coherent nonestablishment theory for one simple reason: *there is none.* The framers understood this truth. They realized that in an area where passionately held values varied so radically,

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134. *Id.* at 91 (White, J., dissenting).

135. 109 S. Ct. 3086 (1989).

136. *Id.* at 3134 (Kennedy, J., concurring in part and dissenting in part).

137. *See* Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1112-22 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985). Instead of distinguishing the establishment clause, Hand simply accepted the popular views of Charles Fairman and Raoul Berger regarding the paucity of evidence for any incorporation theory. *See supra* note 85. The persuasiveness of these arguments should not be understated; but of equal, if not greater importance, especially from a policy perspective, are the federalism concerns subsumed within the first amendment which make incorporation of the establishment clause not only historically unlikely, but logically impossible.

138. *See* Snee, *supra* note 16, at 372 (arguing against incorporation of the establishment clause while sanctioning incorporation generally).

only local government could effectively handle the delicate policy questions that were implicated.

## III. ESTABLISHMENT TODAY: THE POLICY ARGUMENT

> A judge who does not with some regularity reach judgments that conflict with his private policy views is not confronting complicated constitutional questions with sufficient disinterestedness or intellectual rectitude.
>
> —Leonard Levy, 1986[139]

Since the Supreme Court has rejected textual historical evidence as a basis for abandoning its position regarding establishment clause incorporation, the remaining justification must be found in some intrinsic value based solely on policy considerations.[140] That intrinsic value does not exist.

### *A. Federalism Forgotten*

Several legal historians and commentators have reached similar negative conclusions regarding the constitutionality of establishment clause incorporation.[141] These critics, however, have failed to call for its rollback because they identify only a lack of historical justification and not the underlying principles of federalism which make state authority worthy of pursuit. They advocate subtle refinements to separationist theories which are more palatable to nonpreferentialists but do equal injustice to legal history and the protections of federalism.[142] Eschewing the logical conclusions of their own arguments, commentators have concluded their criticisms with the impotent assertion that incorporation is a *fait accompli*.[143]

This treatment of the issue is inadequate. Establishment clause incorporation is not merely an example of constitutionally questionable activism.[144]

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139. L. LEVY, *supra* note 13, at 164.

140. Of course the Court never asserts policy, but only history, for its church/state decisions. A. SUTHERLAND, THE CHURCH SHALL BE FREE 28 (1965).

141. *See* E. CORWIN, *supra* note 14, at 116 (historically there is no basis for incorporation of the establishment clause); Snee, *supra* note 16, at 406-07 (incorporation of the establishment clause into the fourteenth amendment has no firm basis in history or logic).

142. *See, e.g.*, Note, *The Establishment Clause, Secondary Religious Effects and Humanistic Education*, 91 YALE L.J. 1196 (1982). *See also* L. TRIBE, *supra* note 52, at 828 (promoting an "arguably religious" test for the free exercise clause and an "arguably non-religious" test for the establishment clause).

143. *See, e.g.*, Kurland, *supra* note 14, at 11; Paulsen, *supra* note 16, at 317. Paulsen, for example, refers to incorporation as a *fait accompli* after earlier discussing the "nonsensical" nature of incorporation because "the original intention behind the establishment clause . . . [was] to prevent federal interference with a state's choice of whether or not to have an official state religion." Paulsen, like others, is unsatisfied with the Court's treatment of the establishment clause vis-a-vis incorporation, but does not espouse or even consider a rollback. *See also* E. CORWIN, *supra* note 14, at 14 (vehemently attacks incorporation but does not call for its rollback); J. REICHLEY, *supra* note 5, at 157 (rollback is not now "in the judicial or political cards").

144. *See* R. BERGER, *supra* note 21, at 412-13 (calling for the rollback of Bill of Rights incorporation generally to protect against the uncontrolled oligarchic judiciary). Berger's arguments proceed *a fortiori* in the area of establishment clause incorporation.

It is, more importantly, bad policy. The Court's disregard of federalist motivations with respect to the establishment clause not only leads to a tortured interpretation, but also to the forfeiture of a fundamental safeguard for preserving religious liberty. The unique efficacy of federalism as a protector of religious rights is as credible today as it was in the eighteenth century.[145] A careful historical analysis of the establishment clause, therefore, not only reveals one more problem with the Supreme Court's treatment of this very labyrinthine area of law,[146] it also provides a solution.

### *B. Problems with Current Doctrines*

To understand the competence of federalism in preserving liberty, it is first important to comprehend the peculiar nature of the religious establishment problem. This Article agrees with the position of numerous scholars who have concluded that current separationist[147] doctrines often operate in opposition to the principles of tolerance, neutrality and accommodation which they purport to sustain.[148]

#### *1. Inherent Tension*

The most commonly recognized problem regarding church/state legal issues is the innate tension between free exercise and nonestablishment policies.[149] For example, in *Thomas v. Review Board,*[150] the Court invalidated an Indiana

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145. *See* L. TRIBE, *supra* note 52, at 834 ("Religion clauses embody a concept of the relationship between religion and state which must be modified to adapt to changing conceptions of both religion and of government."). *But cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) (arguing that regardless of the failings of any legalistic justification for incorporation, current separationist policies are justified by the changing demographics, politics, and social opinions).

146. An additional cost of establishment clause incorporation is the unnecessary expenditure of federal court time and resources. "The Court has plunged boldly—some would say recklessly—into the thicket of complex relationships involving religion, civil society, and the individual." J. REICHLEY, *supra* note 5, at 117.

147. It is recognized that strict separationism has theoretically been rejected by the Court. However, this Article continues to counter the separationist arguments since they inhabit and animate all current disestablishment theories. Abernathy cites the popularity of separationism thus: "The establishment clause of the First Amendment has long since been replaced in the general literature and in the popular mind to become simply a guarantee of separation of church and state." M. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 249 (1968).

148. "The decisions of the Supreme Court on the use of Bible-reading and prayer in public schools have stirred protest and controversy to an extent rarely equaled in the history of the Court." Id. at 263. The continued veracity of this statement is evidenced in the emphasis placed on candidate opinions regarding school prayer during the 1988 elections.

149. The Court in Waltz v. New York Tax Comm'n, 397 U.S. 664, 668-69 (1970), described its goal as such: "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Cf.* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 53 (E. Dennis, D. Gilmore & D. Grey eds. 1982) (arguing that Justice Black's desire for absolutes does not work with respect to religion).

150. 450 U.S. 707 (1981).

unemployment compensation law that made no allowance for individuals who left their jobs for religious reasons. In dissent, Justice Rehnquist highlighted the potential result of the "tension" when he argued that the Court's reading of the free exercise clause directly conflicted with its previously developed establishment clause jurisprudence: a law permitting benefits for persons who leave employment for religious motivations could be found to violate the establishment clause.[151] There is an obscure line between constitutionally mandated accommodation and constitutionally prohibited establishment.

Lawrence Tribe has suggested that current policies may sharpen tensions by leaning too heavily on nonestablishment theory.[152] Tribe believes that the clauses should be interpreted such that they are "at least compatible and at best mutually supportive."[153] The protections of federalism are not restored, however, by merely diminishing the influence of the establishment clause. As long as nonestablishment is seen as a correlative "right" in itself, conflict cannot be avoided.[154]

Both incorporation and the emergence of the welfare state have served to exacerbate the tension between free exercise and nonestablishment.[155] Specifically, incorporation has greatly expanded the instances in which various state policies might come into conflict with the Supreme Court's nonesta-

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151. 450 U.S. at 725. *See also* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Title 7 exemption for religious institutions passed as a free exercise accommodation yet unsuccessfully attacked as an establishment clause violation). *Compare* Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986) (parents bring action for free exercise exemption from reading text book series which expunged Christian references), *rev'd*, 827 F.2d 1058 (6th Cir. 1987) *with* Smith v. Board of School Comm'r, 827 F.2d 684 (11th Cir. 1987) (similar texts attacked as an establishment of secular humanism). It should be noted that the very "expunging" which was questioned in *Mozert* may have been required to avoid establishment clause violations.

152. L. TRIBE, *supra* note 52, at 819. "Whenever a free exercise claim conflicts with an absolute non-establishment theory, the support of the former would be more faithful to the consensus present at the time of the Constitutional Convention and of the First Congress." *Id.*

153. *Id.* at 812. There has been a push by some toward avoiding the problem of free exercise-nonestablishment tension by melding the two religion clauses into one cohesive religious liberty philosophy. *See, e.g.*, Paulsen, *supra* note 16, at 331-50. While such theories often comport more closely with original intent than do separationist theories, melding the clauses into a single consistent philosophy only makes sense at the national level. A more accurate understanding of the religion clauses, as they apply to government generally, necessitates a restoration of the distinction between them. *See* Laycock, *supra* note 124, at 1373 (first step in defining the issue is to restore the fundamental distinction between the clauses).

154. *Compare* Katcoff v. Marsh, 755 F.2d 223, 237 (2d Cir. 1985) (upholding the military chaplaincy as required to protect free exercise rights of military personnel) *with* Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986) (conceding the free exercise requirement in principle, but proffering a scheme which would ameliorate the inherent nonestablishment violation in the chaplaincy).

155. Thomas v. Review Bd., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (citing incorporation and the emergence of the welfare state as two factors which have exacerbated the tension between the free exercise and nonestablishment clauses).

blishment policy. Likewise, the rapid growth of government has significantly increased the likelihood, and perhaps even the necessity, of church/state interaction.

The emergence of the welfare state not only highlights the inherent tension discussed here, it aggravates the other problems discussed below. America is no longer a nation whose government plays a very limited role in the daily lives of its citizens.[156] Today, there are myriad government programs which must each respect the fundamental right to free exercise,[157] as well as satisfy the standards of *Lemon*. Tribe states regarding the religion clauses: "Those guarantees were originally forged in a context where both the idea of state and the concept of religion were fairly well defined and quite narrowly limited."[158] Indeed, each statement by Thomas Jefferson espousing some form of church/state separation is viewed with a jaundiced eye if not balanced by his numerous speeches in support of limited government and state sovereignty.[159] This is the very reason why Jefferson was so careful to differentiate state and nation with respect to church/state policies.[160] As government increasingly interfaces with the most intimate aspects of peoples's lives, the need for religious involvement is elevated if liberty is to be maintained.[161]

In the last forty years, the "wall" of separation has not only been made higher and more impregnable; it has been moved. School curriculum, for example, once arguably on the church side of the wall, is now clearly on the state side.[162] When two spheres of authority overlap, they cannot be separated by a wall.[163]

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156. Bernard Schwartz states,

> When the Constitution and the Bill of Rights were written, government was only an arbiter, allowing the individual to go unrestrained except at extreme limits of conduct. In the almost two centuries that followed, the system gradually shifted to one in which government had a positive duty to promote the welfare of the community, even at the cost of individual rights. From a constitutional, as well as from a political point of view, the welfare state has become an established fact.

B. SCHWARTZ, *supra* note 25, at 226.

157. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (disallowing refusal of unemployment compensation for religious commitment regarding Saturday work).

158. L. TRIBE, *supra* note 52, at 812.

159. "[T]he true barriers of our liberty in this country are the State governments." Letter from Thomas Jefferson to A.L.C. Destutt de Tracy (Jan. 26, 1811), *quoted in* T. JEFFERSON, WRITINGS 1245 (M. Peterson, ed. 1984). *See generally* T. JEFFERSON, THE COMPLETE JEFFERSON (G. Chinard, ed. 1943).

160. *See supra* text accompanying notes 72-79.

161. *See* J. REICHLEY, *supra* note 5, at 243-346 for a discussion of 20th century society's impact on religion in America.

162. *See id.* at 135-36 (discussing how 19th century America identified education with religion "almost as a matter of course").

163. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 602-05 (1983) (racial policy of religious organization overlaps with racial policy of government).

*2. Biased Neutrality*

> An open foe may prove a curse,
> But a pretended friend is worse.
>
> —John Gay, 1959[164]

> He that is not with me is against me.
>
> —Jesus Christ[165]

A second problem deriving from current establishment clause application is the fact that separationist policies, in the name of neutrality, are inherently biased against religious viewpoints.[166] Long understood by various "fundamentalist" religious groups, acknowledgment of the subordination of religious values has recently become apparent even to leading liberal scholars and judges.[167]

*Edwards v. Aguillard* illustrates this difficulty.[168] By invalidating a Louisiana law requiring that "scientific creationism" be taught alongside evolution, the Court not only questioned the sincerity of state legislators who claimed a secular purpose, it also offended the religious convictions of those

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164. Spano v. New York, 360 U.S. 315, 318 (1959), *overruled,* Miranda v. Arizona, 384 U.S. 436 (1966).

165. *Matthew* 12:30.

166. *See* J. REICHLEY, *supra* note 5, at 415. Reichley describes seven value systems: four religious and three secular. He claims that current constitutional law favors the latter three, but concludes that these secular value systems do not provide moral basis sufficient to maintain the cohesion and vitality of a free society. He also concludes that George Washington, John Adams, and Thomas Jefferson came to the same realization.

167. *See, e.g.,* Carter, *Evolution, Creationism and Treating Religion as a Hobby,* 1987 DUKE L.J. 977 (exposing contradictions in liberal theory of neutrality toward religion). Professor Carter issues a warning to the "liberal activists" who seek merely to maintain strict separation but effectively undermine religion by discounting religious views in relation to more "rationally" derived secular views. He correctly discerns that this represents the same kind of discrimination which previously informed the liberal movement. Why is it appropriate for a member of a legislative body to propose stricter pornography laws because of feminist interests, yet it is inappropriate to base the proposal on its offensive nature with respect to God or some set of religious norms? Such a distinction can hardly be said to uphold neutrality and accommodation of religious values. *See also* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (disinterested insensitivity exhibited by the state toward religion is a subtle form of hostility); McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1, 15 (separation can effectively deny possibility of God's existence). *Cf.* Cover, *Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 33 (1983) (groups understandably take different constitutional positions to "maintain the jurisgenerative capacity of the community's distinct law"). Cover goes on to argue that the problem regarding the jurispathic function of courts is not "unclear" law but "too much law." Different interpretive communities will generate "distinctive responses to any normative problem of substantial complexity." *Id.* at 42. For example, Bob Jones University established a normative community entitled to protection against statist encroachment. Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (denial of tax exempt status due to racist policies). The university position was backed by Amish, Mennonite, Baptist and Jewish organizations due to "paideic autonomy" of religious community in education of young. Cover, *supra,* at 62.

168. 482 U.S. 578 (1987).

who simply believed creationism to be true.[169] Some argue that free exercise can be maintained since religious instruction can be given in the home or at church.[170] However, any such proscription does violence to religiously motivated instruction, even outside the classroom. One would be understandably hesitant to explain to a child that while the religiously informed viewpoint in fact represents the truth, it cannot be taught at school; yet, a fallacious "scientific" theory is appropriate for the classroom, but should not be believed.[171] Current separationist doctrines effectively discount this kind of religiously informed perspective.[172] Far from being "neutral," this type of separationist policy effectively degrades religion to the status of an irrational hobby.[173]

### 3. *Nonestablishment's Establishment*

> The greatest question of our time is not communism versus individualism, not Europe versus America, not even the East versus the West; it is whether men can live without God.
>
> —Will Durant[174]

The third problem follows as a corollary from the second. To the religious person, the secular philosophy which has ousted his or her spiritual viewpoint

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169. The Court seems to have made an assumption that the religious interests involved are not represented by a desire for truth, but a desire to inculcate religious beliefs and thus subvert the secular interests of non-religious children. *Id.* at 593.

170. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

171. This same argument was used by the Court to support the idea that even nonmandatory school prayer subverts the interests of nonreligious school children. *Abington,* 374 U.S. at 203. *Cf.* Quick Bear v. Leupp, 210 U.S. 50 (1908) (religious convictions mandated the mingling of religious and secular studies); Cover, *supra* note 164, at 25-35 (discussing how various groups use universally accepted devices to create a *nomos,* "an integrated world of obligation and reality from which the rest of the world is perceived").

172. Some would argue that "secular" subjects can be differentiated from the religious. Such arguments, however, necessarily cabin one's religious views. *Cf.* Smith v. Board of Educ., 655 F. Supp. 939, 966 (S.D. Ala. 1987), *rev'd,* 827 F.2d 684 (11th Cir. 1987) (Dr. Kennedy testified there was no distinction between secular and sacred).

173. *See* Carter, *supra* note 164. Again, the welfare state has diminished government's ability to remain neutral due to the increased occasion for government financial support of various religious institutions. In the eighteenth century, many believed such support to be a clear way to "establish" a church. Justice Douglas said that, "The most effective way to establish any institution is to finance it." *Abington,* 374 U.S. at 229 (Douglas, J., concurring). As Paulsen points out, in the modern state, the best way to "disparage any institution is to deny it financial benefits to which others are entitled as a matter of course." Paulsen, *supra* note 16, at 354-55. Many social institutions putting forward secularist views are recipients of government funds. Separationist prohibitions against similar religious organization support obviously contribute to an unfair situation. *But cf.* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334-40 (1987) (establishment clause leaves room for "benevolent neutrality" including section 702 tax exemption despite discriminatory hiring policy); Walz v. Tax Comm'n, 397 U.S. 664, 672-74 (1970) (allowing property tax exemption); Board of Educ. v. Allen, 392 U.S. 236, 241-49 (1968) (allowing loan of books to parochial school children).

174. *See* C. COLSON, KINGDOMS IN CONFLICT 225 (1987).

is equally "religious" as far as it controverts truth.[175] Thus, to the creationist, evolution can represent one component of a secular religion, or, "secular humanism."[176] Courts have recognized secular humanism as a religion on several occasions,[177] and have thus acknowledged the difficulty of applying a broad separationist principle to a narrowly defined concept of religion.[178] This inverted situation, which favors irreligion, undermines positive aspects of the establishment clause which ideally should promote voluntarism and thus force religion *or* irreligion to prosper based only on intrinsic merit.[179]

Various theories have offered two equally inadequate solutions to the problem. Treating secular humanism as a religion by prohibiting its establishment might seem to preserve desired neutrality, but the expanding role of the welfare state would make the task absurdly difficult. As government's involvement in social programs increases, so does the likelihood of overlapping secular and religious interest.[180] Likewise, the nonpreferentialist contention that the establishment clause was never intended to favor irreligion over religion may be historically accurate, but it leads to an inconsistency in theory which discriminates against atheistic views.[181] Absolute separation of

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175. *See* F. COLUMBO, *supra* note 128, at 153 (1984) ("More and more, the neo-Christians [and the new right] have been quoting [Everson] to support their allegations that the nation's judicial system in recent decades has moved away from religion and 'irreligion has now become a religion'").

176. Professor Wilber G. Katz observed that the elimination of religion from the school curriculum amounts to the establishment of secular humanism. W. Katz, *Religion and American Constitutions,* Julius Rosenthal Foundation Lecture, Northwestern University School of Law (Mar. 21, 1963). *See also* THE WALL BETWEEN CHURCH AND STATE 5 (D. Oakes, ed. 1963); Note, *supra* note 140, at 1217-18 (*Lemon* test can establish secular humanism).

The nineteen eighties saw numerous battles between Christianity and secular humanism. In the ninteen nineties the religion could very well battle new foes such as "New Age" philosophies. The issue is not specific doctrines but the ability of modern philosophies to claim the preferred status of "irreligious".

177. *See* United States v. Seeger, 380 U.S. 163 (1965); Torcaso v. Watkins, 367 U.S. 488 (1961); Smith v. Board of School Comm'r, 655 F. Supp. 939 (S.D. Ala.), *rev'd,* 827 F.2d 684 (11th Cir. 1987); Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985).

178. *Smith,* 655 F. Supp. at 966, is an excellent example of how the current *Lemon* test will always seem inappropriate to the prejudiced religious faction. Under the "primary effect" prong, the court is left to decide whether the primary effect is to either advantage or inhibit religion. Judge Hand thought that the text books in question in *Smith* did have such an effect. The litigants obviously shared this view. The three judges sitting for the eleventh circuit, however, not only thought otherwise, but saw such a view as "clearly erroneous." *Id.* at 690 n.41.

179. *See* L. TRIBE, *supra* note 52, at 819 (discussion of voluntarism under the establishment clause).

180. For example, in 1960, state and local governments contributed only negligible amounts to private colleges and universities. By 1970, the amount had reached $100 million. In the same period, federal aid jumped from $500 million to $2.1 billion. Lemon v. Kurtzman, 403 U.S. 602, 630 n.13 (1971) (Douglas, J., concurring).

181. Leonard Levy claims that nonpreferentialists "prefer government sponsorship and subsidy of religion rather than allow it to compete on its merits against irreligion and indifference."

church and government is an impossibility which must be acknowledged before profitable discussion can take place.[182] Any attempt to erect a wall separating church and state necessarily favors the values of anyone whose world view can be described as "irreligious."[183]

### 4. *Popular Sovereignty and the Popular Minority*

A final and more intricate problem involves the unnecessary violation of popular sovereignty. A local government's freedom to legislate is a bulwark for the maintenance of government "by" and "for" the people. Polls suggest that a large segment of the United States population desires that organized voluntary prayer be put back in the public schools.[184] Its prohibition does not reflect popular sovereignty; it advances the interests of an irreligious minority.[185]

At first glance, it would seem that this accords with the manner in which many constitutional prohibitions operate. However, such is not the case.[186]

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L. LEVY, *supra* note 13, at 118. Many claim that this contention is inverted. Perhaps religion is being forced to compete against an "established" atheism. *See* F. COLUMBO, *supra* note 128, at 153 (discussing new right view that "irreligion has now become a religion"); F. SCHAEFFER, A CHRISTIAN MANIFESTO (1981).

It could be argued that protection of "religious" beliefs and practices should be favored over general libertarian rights because religion, when offended, can have transcending ramifications not present in other situations.

182. On a superficial level, this fact is obvious. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (some government-religious organization relationship inevitable); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) (same); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (same). In a more fundamental way, government must eventually advocate some religious viewpoints. *See* Laycock, *supra* note 124, at 1374 (suggesting total separation is an impossibility). *Cf.* Jaffree v. Board of School Comm'r, 554 F. Supp. 1104, 1130-31 n.41 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983) ("slippery slope" argument about impossibility of purging all religious views from public school system), *aff'd,* 466 U.S. 182 (1984).

183. *Compare* Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (invalidating *Scopes*-type anti-evolution statute as violation of religion clauses) *with* Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating Louisiana law requiring "creation science" to be taught in conjunction with evolution). It could be said that the religious who previously attempted to discriminate against the irreligious (in *Scopes*) are now getting a dose of their own medicine. However, instead of working like a pendulum, the present situation, which constitutionally invalidates *only* religious teaching, is better described by the analogy of a ratchet. In both *Scopes* and *Aguillard,* the views of an arguably religious majority were at stake. Only the irreligious view in *Scopes,* however, eventually prevailed.

184. *See* J. REICHLEY, *supra* note 5, at 149 (claiming national opinion polls consistently show 75% of public favors return to organized, voluntary prayer in schools); U.S. News and World Rep., Apr. 6, 1987, at 64 ("In a recent *Atlanta Journal* and *Constitution* poll of 2,000 likely Republican voters in a dozen southern states, 3 of every 4 favored a constitutional amendment authorizing public-school prayer.").

185. It is recognized that the minority enfranchised in the school prayer example could also be one motivated by religious concerns. The key issue is not disenfranchisement of the religious, but disenfranchisement of a majority.

186. Individual rights are safeguarded through two means: popular sovereignty for the

Constitutional guarantees often frustrate popular desires, but that frustration usually implicates a constitutionally *inferior* interest.[187] In establishment clause cases, the interest of the advantaged minority is often no more legitimate than that of the majority. Separationist policies subvert popular sovereignty, yet do *not* appreciably increase the protection of religious interests. Current establishment clause interpretations simply inject an institutional bias against one candidate for majority control. While separationist policies may ensure that no majority religious group becomes too powerful,[188] *all* religious groups, whether representative of majority or minority interests, are disadvantaged vis-a-vis the irreligious.[189]

This unnecessary bias is peculiar only to the area of religion. While protection of other fundamental rights engenders difficult tensions, these tensions do not force a choice between competing groups with constitutionally equivalent claims. For example, in the area of seditious speech, public safety interests may be required to yield to the dominance of the first amendment freedom of speech right.[190] Similarly, in the criminal process, a fundamental constitutional guarantee for the accused may "trump" society's interest in procedural efficiency or public safety.[191]

Establishment problems, however, represent a different breed of tension in that religious liberty concerns exist on both sides of the balancing equation. The *Aguillard*[192] case is illustrative of a situation in which a majority's sovereign interests could be subverted by the establishment clause, but, unlike the above examples, the interest in separation deserves no trumping authority over an explicitly protected right to free exercise. In that case a majority of the Louisiana legislature decided that their public schools should, in the name of "academic freedom," teach creation science in conjunction with

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majority and specific constitutional protection for the minority. At one time the religion clauses protected both. However, current constructions of the establishment clause discriminate against the majority religious viewpoint regardless of the possible nonexistence of majority subversion of minority rights.

187. For example, compare an individual's right to free speech and the citizen's right to an environment free from vulgar or offensive language. *See* Cohen v. California, 403 U.S. 15 (1971) (overturning prosecution for vulgar "speech").

188. The value of the free exercise clause must not be forgotten with respect to this issue. The question is not whether or not this interest is protected, but whether the additional protection of the establishment clause is needed. *See infra* note 229.

189. There is no separate provision mitigating this problem as there is for that of inordinate influence of a religious sect. It is interesting to note that the "Bill for Establishing Religious Freedom," proposed by Madison, penned by Jefferson, passed by the Virginia assembly in 1786, and oft cited by separationists as an example of revolutionary sentimentalities, actually disestablished the Anglican Church which, at the time, represented only a slim minority of the population. Hart, *The Wall that Protestantism Built,* 46 HERITAGE FOUND. POL'Y REV. 44, 50 (Fall 1988).

190. *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969) (invalidating law punishing advocacy of racial violence).

191. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

192. 482 U.S. 578 (1987).

evolution.[193] The law was invalidated based on a summary judgment that the law's intent was really to further Christianity. This holding, however, begs the question of what free exercise rights a majority has when it thinks the "secular" curriculum is teaching falsehoods. Indeed, it is presumably this free exercise right which is being protected by the separationist doctrine. In such a case, a majority religious interest is supplanted by the identical, not superior, interest of a minority.

Self-government is the principal means for securing liberty,[194] yet, in a noble attempt to become the guardians of religious rights, the Supreme Court has dismantled this most fundamental protection.

### C. *Federalism's Solution*

Both the simplistic strict separationist position and the more subtle *Lemon* test present serious threats to religious liberty. The ramifications of a policy which attempts to shield government from the influence of religion lead to violations of free exercise, discrimination against religious persons, and frustration of the popular will. These negative consequences more than offset any benefits acquired by a separationist policy. The banning of religion from public life is not the intent of the establishment clause, however, and the deficiency of separation, therefore, does not operate to vilify the first amendment.

#### *1. The Case for Rollback*

By formulating an efficient procedural framework, the establishment clause simply places church/state authority in the hands of the more appropriate decisionmaking forum—i.e., the states.[195] It is this animating federalist intent which serves to mitigate the very problems that current establishment clause interpretations aggravate.

If all church/state separation doctrines were discarded, popular sovereignty concerns would be satisfied, the majority's free exercise interests would be accommodated, and bias favoring irreligious perspectives would be discarded. The free exercise clause would protect against violations of minority religious rights. Assuming the inevitability of some subtle state espousal of a religious view, most would agree that this design is preferable to one allowing "non-

193. It is assumed arguendo that the Louisiana state legislative intent represents a majority interest. It is realized that a state legislature's ability to reflect majority concerns is an issue in and of itself. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59-68 (1982). Few would argue that the fourteenth amendment incorporated provisions of the Bill of Rights to protect majority interests.

194. THE FEDERALIST No. 41, at 255 (J. Madison) (C. Rossiter ed. 1961).

195. The choice being made here is between state and national government. There is no intent to claim preference for state over more local bodies. Indeed, an application of the principles proffered by this Article would force many church/state decisions into the hands of local government. This was not uncommon even in colonial times. *See supra* note 38.

religious" minority views to prevail over the popular will.[196] This scheme does not satisfy expanded American concepts of liberty, however, as majority accommodation is not enough. The depreciation of *anyone's* beliefs should be avoided if at all possible. A worthwhile goal, therefore, is to strive for accommodation of as many religious perspectives as possible without offending the rights of the majority. Herein lies the benefit of federalism.

A majority "will" is rarely discernible nationally, and even if it were, its imposition would hardly be efficient in accommodating the greatest number of people. The very difficulty the Court has had in creating a cohesive and popular nonestablishment policy evidences this fact.[197] The solution, therefore, is not found in any specific church/state policy, but in the same concept of federalism advocated by the Constitution's framers. Under this arrangement, each community retained its freedom to develop procedures and principles which would accommodate the greatest portion of its own population. Since most religious concerns had their outlet in *local* politics, there was no need for national legislative competence.[198] This federalist concept, applied today, could provide for legislation which maximizes accommodation,[199] yet minimizes discrimination.[200]

The result would be a greater deference to popular sovereignty, and a more efficient allocation of legislative competence. This efficiency could be

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196. Britain and several Scandinavian countries have for years protected free exercise while supporting religious establishment. West Germany and Switzerland endorse religion generally by providing for "multiple establishments." J. REICHLEY, *supra* note 5, at 135. By contrast, the constitution of the Soviet Union employs a clause depicting a church/state wall of separation. *See* KONST. SSSR art 124. But can it be said that the Soviet citizenry enjoys more religious liberty than Britons or nineteenth century New Englanders? For a description of various foreign treatments of church/state relations, see L. PFEFFER, *supra* note 38, at 28-62; W. RAWLE, *supra* note 87, at 121.

Pfeffer concludes that religious liberty is most secure where church and state are most completely separated. L. PFEFFER, *supra* note 38, at 62. This conclusion is ill-informed. While it may be true that some form of separation commonly exists in states where religious freedom is present, there are few foreign examples of church/state separation which rival U.S. treatment. The Soviet Union stands out as one such example and it could only be described as an exception to Pfeffer's rule. The advisability of *some* separation does not support a call for "complete" separation.

197. *See* Committee for Public. Education v. Regan, 444 U.S. 646 (1981) ("Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country.").

198. *See* text accompanying notes 23-44.

199. *See* McConnell, Book Review, 54 U. CHI. L. REV. 1484, 1496 (1987) (example of federalism's ability to more efficiently accommodate popular views). *See generally* Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425 (1987) (emphasizing role of state courts and legislatures in promoting constitutional values).

200. Acknowledging the inevitability of some subtle discrimination, the key to federalism's value lies in its ability to prevent all "unnecessary" discrimination. In the eighteenth century, like today, there were few religious interests which required government involvement at a *national* level. Schools, for example, were controlled locally. Therefore, there was no legitimate need for a religious majority to legislate matters nationally which could affect the state school systems.

derived through two means: (1) the manufacture of case-specific solutions for the diverse church/state problems which differ among various demographic situations;[201] and (2) the ability to conduct local "experiments" which would not upset the entire national polity.[202] The wide variance of religious opinion in the United States, and its disproportionate distribution, make it certain that application of federalism principles in this area would enable a greater number of people to enact laws which accord with their own religious convictions. Discrimination problems are properly resolved through free exercise protection, establishment problems through democratic government.[203]

### 2. *The Case For Separation*

The concerns of many separationist scholars are legitimate and are not fully resolved by the federalist scheme. Justice Brennan probably best articulates these problems in his concurring *Abington* opinion. Brennan argues the infeasibility of a "common core" of theology tolerable to all creeds.[204] He also accurately points out that a policy which "establishes," but does

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201. National policy decisions cannot be tailored to meet the needs of all groups. As legislative authority is pushed down toward the people, governments can adjust specific policies to reduce infringement of minority rights (e.g. a town that is 40% Jewish might adjust its school calendar to accommodate religious holidays). Michael McConnell cites three advantages of decentralized decisionmaking: (1) ability to reflect diversity of interests; (2) preventing mutually disadvantageous attempts of communities taking advantage of each other; and (3) innovation and competition among governments. McConnell, *supra* note 194, at 1493-1500.

It should be noted that people could also "vote with their feet." While this might seem unrealistic regarding states, people regularly decide where to reside based on the quality of the public school system. Free exercise protections would ensure that there would be no *need* to relocate because of church/state interaction, but it is not unreasonable to predict that local demographics would adjust to reflect subtle differences. *See* Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416 (1956) (mobility and decentralized regime can combine to thoroughly satisfy preferences).

202. The excessive number of 5-4 Supreme Court decisions evidences an inability to agree on an appropriate church/state policy. *See, e.g.*, the five separate opinions in Allegheny v. ACLU, 109 S.Ct. 3086 (1989). This impasse could be circumvented, and effective policies developed, if states were allowed to serve as proving grounds for the various solutions to the church/state dilemma. Justice Brandeis once said: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. . . ." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also* Chandler v. Florida, 449 U.S. 560, 582 (1981) (states may permit electronic media at trial because notions of federalism require states to be able to experiment); Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 493 (1954) ("State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.").

203. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." THE FEDERALIST No. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

204. Abington School Dist. v. Schempp, 374 U.S. 203, 286 (1963) (Brennan, J., concurring).

not mandate adherence, is hardly neutral. Excusing school children from Bible reading, while satisfying free exercise demands, does little to fulfill neutrality requirements and does not eliminate subtle influences.[205] Brennan joins many in his fundamental argument that freedom from establishment is a right in itself.[206]

Justice Brennan admits to the legally problematic nature of establishment clause incorporation, but opines that state disestablishment made any intent to protect state churches an historical anachronism.[207] He also argues that today's increased plurality and heightened government involvement in personal affairs demand an expanded application of nonestablishment principles.[208] Federalism does not purport to offer a clean solution to all church/state problems, but the remainder of this Article demonstrates why the federalist scheme is significantly superior to the one we now have.

### 3. *Exaggerated Fears*

> Who's to say religion and politics shouldn't mix?
> Whose Bible are they reading anyway?
>
> —Archbishop Desmond Tutu[209]

While Justice Brennan effectively demonstrates that today's circumstances do not closely resemble those of yesterday, he fails to adequately explain why the new situations push in the direction of church/state separation. In fact, the inverse is true. As government becomes more involved in the daily lives of individual citizens, the inevitability of church/state interaction increases and the mistaken temerity of separationist doctrines becomes more evident.[210] Government is an arm for administering the will of *all* people, not just those whose interests are nonreligious. Modern relations between citizen and state provide a stronger, not weaker, case for reliance on federalism principles.

Equally unpersuasive are Brennan's arguments regarding the heterogeneous nature of modern society.[211] The fact that actual church establishment is so

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205. *Id.* at 288.

206. *See, e.g.*, L. LEVY, *supra* note 13, at 168. "Freedom from an establishment, even a nonpreferential one, is an indispensable attribute of liberty." *Id.*

207. *Abington,* 374 U.S. at 255.

208. *Id.* at 240. *See also* L. LEVY, *supra* note 13, at 175 (arguing that the establishment clause should be broader in meaning because we are more religiously pluralistic).

209. *See* C. COLSON, *supra* note 171, at 277.

210. *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (Rehnquist, J., dissenting) (pointing to the increasing inevitability of church/state interaction.) *See also* J. REICHLEY, *supra* note 5, at 136 (discussing impracticability of excluding religion from various human affairs); L. TRIBE, *supra* note 52, at 812 (same).

211. By focusing on the heterogeneous nature of modern society, Justice Brennan inadvertently points to the applicability of Madison's argument that when there is a greater variety of parties and interests there is a smaller likelihood of invasion of individual rights. THE FEDERALIST No. 10, at 83 (J. Madison) (C. Rossiter ed. 1961). *See also* THE FEDERALIST No. 51 (Madison expressing concern over prospect of majority faction invading rights of others).

antithetical to our twentieth century sensibilities does not confirm the need for a separationist policy; it allays fears that reestablishment will actually take place.[212] America's religious evolution portends the inverse of a drastic increase in church/state entanglement;[213] each state constitution now contains a provision protecting free exercise,[214] and no state has indicated a desire to establish a religious sect.[215] Throughout the past century the emerging plurality has directed states toward *dis*establishment.

The argument is not that church/state separation as we know it will remain secure.[216] If strict separationist policies were abandoned to accommodate federalism principles, there would undoubtedly be instances of legislation supporting certain religious views or favoring religion generally.[217] Regrettably, as in all political decisions, discrimination might arise. The inferior position of the minority in a world without incorporation, however, need be no more severe than it is under existing doctrines.[218]

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212. A majority coalition today would need to profess some acknowledgment of a restraint on church/state interaction in order to be politically viable. It is less likely that an establishment-oriented faction will gain discriminatory control in 1990 than it was in 1790 because such a faction would have far more difficulty in capturing a majority voice. *See* J. REICHLEY, *supra* note 5, at 157 (discussing political realities of 20th century with respect to religious factions).

213. *See* Comment, *supra* note 101, at 944 (concluding that the principle ground for rejecting the Blaine Amendment was that state constitutions afforded adequate protection). *Cf.* Paty v. McDaniel, 547 S.W.2d 897, 900-01 (Tenn. 1977) (instance where state went farther than the first amendment in separating church and state by prohibiting ministers and priests from serving in the legislature).

214. Thirty-four state constitutions contain provisions prohibiting the actual establishment of a state church. Sachs, *Fundamental Liberties and Rights Against the 50 States,* in INDEX, LEGISLATIVE DRAFTING AND RESEARCH FUND OF COLUMBIA UNIVERSITY 79 (1982).

215. The argument for rollback is not meant to rely on a claim that church/state separation as we know it would remain intact. Utah, to some, might stand out as a possible exception to the general rule that church/state interaction would remain minimal. Interestingly, establishment in Utah was also a concern for Congress when it reconsidered a form of the Blaine Amendment in 1888. 20 CONG. REC. 421 (1888); O'Brien, *supra* note 98, at 197. This is a problem, however, which is best worked out within Utah's polity. In fact, Utah's constitution states: "The State shall make no law respecting the establishment of religion or prohibiting the free-exercise thereof." UTAH CONST. art. I, § 4. The free exercise clause remains to prevent egregious violations of religious liberty. *See infra* note 229.

216. Conversely to the nonestablishment provision in many state constitutions, the constitutions of all 50 states contain an appeal or a prayer to the "Almighty God." *See* CORRESPONDENT, Dec. 1984, at 5, col. 2.; W. KATZ, *supra* note 61, at 3-5. This suggests that the framers of these constitutions did not see disestablishment as requiring the severing of all state religious involvements. It is thus likely that state judiciaries would differ with the Supreme Court's interpretation of the establishment clause.

217. *But cf.* I. BRANT, *supra* note 51, at 345 (arguing that one who "can establish Christianity can establish any sect").

218. Discrimination, of course, is not the only concern. *See* T. CURRY, *supra* note 14, at 8, 175, 217; L. LEVY, *supra* note 13, at 168, 183-84 (describing concern of historical theologians like Isaac Backus and Roger Williams regarding corruptive influence of government involvement in church affairs). What is being called for here is not a coalescing of church and state as a policy matter. Indeed, this author earnestly espouses some forms of separation. *See* C. COLSON,

The free exercise clause would still remain as the strongest safeguard of religious liberty for the minority.[219] The idea that general government disability is necessary to supplement that safeguard, is both specious and atypical. Drawing again from the related area of free speech while neither federal nor state government can arbitrarily limit one's right to free expression, the government itself is not correlatively constrained with an inability to speak.[220]

*4. Federalism Remembered*

By 1833 all states had abandoned established churches.[221] Justice Brennan asserts that this development renders any states-rights issue moot. Such an assertion, however, begs the question of why that opens doors for a restriction of state authority. Likewise, the argument fails to recognize continuing applicability of federalist doctrines in church/state policy-making. The contention might have some validity if actual church establishment were the only concern,[222] but the argument is particularly inappropriate considering the Court's expansive reading of the establishment clause. Disestablishment did not mean that the states abandoned all religious influence in government. Quite to the contrary, many simply adopted a nonpreferentialist approach which to a greater or lesser degree promoted Judeo-Christian principles.[223]

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*supra* note 171, at 48 ("Victory for either [religious or political institutions] would mean defeat for both."). The goal of this Article is the adoption of a better method for separating the two realms so that they might coexist in a way which forces religion to succeed on its own merits, yet removes unnecessary obstacles to its furtherance and the sovereignty of the American people.

219. There is one adjustment which may be called for by the nation's evolution; that is the extension of free exercise rights to the irreligious. While rollback of incorporation appropriately causes the nonreligious to lose their favored status, religious liberty also insists on equal protection for all views. If free exercise rights were not thus extended, rollback could cause a loss of liberty for the atheist.

220. Government espousal of a specific ideology does little to encourage neutrality, yet few would call for the prohibition of a public school teacher's democratic rhetoric in the presence of children with Communist philosophies. The Communist is guaranteed the right to speak what he or she believes, not to be free from an opposing government sponsored view (or even to be free from paying taxes to support it).

221. Among the last were: South Carolina in 1790, Maryland in 1810, Connecticut in 1818, New Hampshire in 1819, and Massachusetts in 1833. J. REICHLEY, *supra* note 5, at 111; Paulsen, *supra* note 16, at 317 n.37.

222. Of course, there would then today be no claims of establishment clause violation.

223. *See* J. REICHLEY, *supra* note 5, at 115 for a discussion of nonpreferentialist approaches. Maryland, for example, required a declaration of belief in God as a prerequisite for the holding of public office until 1961. State courts, even from states without established religions, often held Christianity to be part of the common law. Even advocates of the Blaine Amendment seem to have approved of nonpreferentialist approaches. The second proposal of the "school-church" amendment in 1876 included a clause in the Senate version which assured that the amendment would never be interpreted to exclude Bible reading in public schools. 4 CONG. REC. 5245 (1876). Subsequent proposals even mandated the teaching of religion. O'Brien, *supra* note 98, at 194-98. *See also* 7 CONG. REC. 252 (1878) (similar provision in subsequent proposal). It seems that even the legislators that presumably favored incorporation never desired an establishment clause which would apply more comprehensively against states than against the

One need not abandon disestablishment as a policy[224] in order to allow more state flexibility in legislating on religious matters.[225]

The one supplemental safeguard which can positively complement the right to free exercise is the establishment clause's scheme for distributing decisionmaking authority. Popular will should not be subverted to avoid subtle religious influence when the inverse situation is just as discriminatory to an even greater number of people. However, if that popular will can be satisfactorily expressed at a more local level of government, it should be encouraged. Besides providing an outlet for popular sovereignty, this scheme insures the smallest possible intrusion on minority religious interests.[226] As the level of active decisionmaking moves closer to the people, the enacting of varied policy decisions can greatly increase the number of people satisfied with the result.

Policy concerns regarding religious liberty in a society without incorporation are indeed valid, but reliance on separationist doctrines to resolve those concerns is misplaced. The propitious balance of power contemplated by the establishment clause can provide a more equitable solution.[227] Federalism in this area dictates that judicial scrutiny in church/state matters focus on the appropriateness of a particular forum for deciding a policy question and not the policy itself.[228]

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federal government. *But cf.* L. LEVY, *supra* note 13, at 93 (arguing that the first amendment should not be viewed as *empowering* Congress in any way—i.e. it did not authorize nonpreferential support). In response to Levy, it should be remembered that states already possessed the power to support religion long before the first amendment was passed. Therefore, even allowing for incorporation of the establishment clause, there is nothing to preclude a nonpreferentialist position with respect to states.

224. "[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation." Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

225. Without "establishing" a religion, a state might simply adjust the overbroad way in which the Supreme Court has applied the establishment clause. One survey demonstrates the potential for different rulings on nonestablishment issues by merely changing the forum to that of the state courtroom. "[O]f the 23 state appellate courts which have considered the issue of Bible-reading in public schools, 17 held that the practices challenged did not violate state or federal constitutional provisions." M. ABERNATHY, *supra* note 145, at 263.

226. *See supra* note 196.

227. *Cf.* G. CALABRESI, *supra* note 189, at 8-15. The "Flight to the Constitution" and its Bill of Rights can be a quick fix which leads to harmful long-term results. The federal system can, on occasion, impede the efficient administration of government. The opposite is true in this area, however, where the federal courts have shown themselves to be incompetent in developing a coherent body of law. *See* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting). In *Wallace,* Justice Rehnquist stated in dissent that:

> [I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'

*Id.*

228. Chancellor Kent once stated: "The most solid basis of public safety consists, not so

### D. Federalism at Work

What is needed today is the reformulation of a dual standard where stricter separationist principles are applied to the federal government and states are permitted greater freedom. This kind of federalist structure is certainly not foreign to the Court and has been successfully applied in other contexts. Justice Harlan argued in favor of a "dual standard" for state and federal governments in free speech cases.[229] Justice Scalia voiced federalism concerns in his dissent to *Aguillard*,[230] and Justice Rehnquist has often referred to the unhappy demise of state autonomy.[231] The case for an analogous dual standard in the area of religious liberty proceeds *a fortiori* from the treatment Justices Harlan and Burger have given to the law surrounding freedom of expression for two reasons. First, establishment questions implicate counterbalancing free exercise rights which are themselves constitutionally protected. In the area of speech, the dual standard is warranted merely to give greater deference to a state's analysis of competing interests and to acknowledge areas of unique state competence (e.g. police powers).[232] These interests are not themselves constitutional guarantees. With respect to the establishment clause, however, the competing concern is itself a constitutionally protected community interest, i.e., religious liberty.

More importantly, arguments for a dual standard proceed *a fortiori* in the area of religion because the Constitution more explicitly mandates a federalist scheme with respect to religious liberty. The constitutionally blessed policy

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much in bills of rights, as in the skilful organization of the government and its aptitude, by its structure and by the spirit of the people to produce wise laws." J. KENT, *supra* note 47, at 205.

229. *See* Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring in part and dissenting in part). By concurring in an opinion applying federal law, Harlan acknowledged a violation of the right to free speech. By dissenting to the state law portion of the decision, however, he acknowledged a state's interest in having obscenity standards and gave greater deference to state competence in balancing local interests. Justice Burger's treatment of obscenity and free speech in his Miller v. California, 413 U.S. 15 (1973), decision similarly recognizes the wisdom of allowing local majority-created community obscenity standards to prevail in cases involving competition with free-speech rights. When two legitimate fundamental policy concerns are in issue, treatment of the concerns is best done where the effects are felt. *See also* W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT (1984) (arguing expanded need for police powers at state level).

230. Edwards v. Aguillard, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

231. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting). Justice Rehnquist states, "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* at 718.

232. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." Miller v. California, 413 U.S. 15, 33 (1973). Justice Harlan's dual standard obviously does not require an actual rollback of the incorporation theory, but the policy effects are analogous. "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their function and duties in relation to those freedoms." Roth v. United States, 354 U.S. 476, 505 (quoting from Beauharnais v. Illinois, 343 U.S. 250, 294-95).

with respect to speech finds its authority in the structure of government and in the broad provisions of the tenth amendment. Deference regarding church/state policy, however, distinguishes itself in a specific clause mandating a federalist structure. The establishment clause not only complements the federalism principals of the tenth amendment; it presumably negates any confusion regarding their applicability in the area of religion. "[I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."[233]

A similar federalist scheme could be beneficially applied in matters of religious establishment. Establishment issues which implicate minimum free exercise and equal protection concerns should be subject only to state scrutiny. Undoubtedly, many of the cases which now appear before the Court would be reframed to express legitimate free exercise interests.[234] In deciding these cases, the Court would properly limit its rulings to issues which directly impact free exercise rights but do not diminish the state's authority to resolve the complex situational problems regarding church/state relations.

The school prayer issue presents a good example of how the policy could work. If a school district enacted a policy of providing a recited prayer during the school day, an offended parent's complaint could be expected to implicate both free exercise and establishment concerns. Assuming the policy met the state's constitutional mandates, the Supreme Court would properly hear the free exercise claim. But in tailoring a remedy, it would defer to state desires respecting church/state ties. The Court might rule that the state must accommodate a Buddhist student's religious convictions by exempting him or her from attendance. It would be improper, however, for the Court to reject the state's entire policy which presumably satisfies the free exercise concerns of a majority of the class.[235]

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233. Abington School Dist. v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting).

234. One commentator has suggested how similar legal results could be obtained by processing establishment clause claims under the free exercise clause via a class-action mechanism. Note, *Reconceptualizing Establishment Clause Cases As Free Exercise Class Actions,* 98 YALE L.J. 1739, 1739-40 (1989) (arguing that many presently proscribed church/state interactions would remain constitutionally infirm under free exercise analysis instead of establishment clause doctrines). *See also* Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986) (free exercise case which could have been fashioned under the establishment clause as in Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala.), *rev'd,* 827 F.2d 684 (11th Cir. 1987)).

235. Another example can be found in Edwards v. Aguillard, 482 U.S. 578 (1987). Leo Pfeffer has argued that while the Court's ruling regarding improper establishment is correct, the free exercise concerns of certain students might mandate that special provisions be made for instruction in creationism. L. Pfeffer, Address at Yale Divinity School (Apr. 1988). This kind of policy, though sensitive to religious liberty concerns, could prove to be extremely inefficient. If the majority of students claimed a religious right to be taught creationism alongside evolution, the result would be an expensive and unusual situation in which a majority of the

## III. CONCLUSION

The wording of applicable constitutional provisions, the historical intentions of its framers, and current policy concerns all militate against the current Supreme Court establishment clause doctrine. The only justification then remaining is precedent, and, by itself, precedent is no justification.[236] When all legitimate bases for a constitutional doctrine are exhausted, intellectual respectability, constitutional integrity, and deference to popular sovereignty mandate that it be overturned.

This nation's forefathers devised a scheme to resolve the free exercise-nonestablishment tension—a scheme which worked for 150 years and can work today. The Supreme Court, in deciding to apply the establishment clause to the states, has incorrectly interpreted the Constitution. It has thus upset the balance contemplated by our federal system, inverted the rights and prohibitions designed for nation and state with respect to religion, and caused unnecessary inconsistency and strain on church/state relations.

Church and state law represents the quintessential opportunity for application of federalist principles. While federalism does not eliminate religious liberty concerns, it provides a solution which mitigates deleterious effects on freedom. It is a solution which represents the wisdom of both the past and the present. The Supreme Court should adjust its doctrine with respect to the establishment clause and defer to state governments when nonestablishment issues are raised and free exercise concerns are minimal. This reliance on federalism would facilitate a more coherent and equitable constitutional law.

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class would be sent elsewhere for special instruction. Under a scheme which defers to local majoritarian interest, the default course of instruction would involve both evolution and creationism. If the resultant violation of religious freedom seemed egregious enough, the Supreme Court might then rule that the state must provide special instruction for the minority of students who's religious freedom was offended.

236. Precedent can itself be contradictory and often shifts. In areas involving the federal Constitution, the doctrine of *stare decisis* is particularly inappropriate as the sole support for judicial misinterpretation since correction through legislative action is practically impossible. *Cf.* Wells, *The Unimportance of Precedent in the Law of Federal Courts,* 39 DEPAUL L. REV. 357 (1990) (arguing that stare decisis is less important in federal courts cases than elsewhere). Hence, the Court has been more willing to examine and overrule constitutional precedent than it has statutory precedent. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting). "[This Court's] opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849), *quoted in* Graves v. O'Keefe, 306 U.S. 466, 492 n.11 (1939).